IN THE

Supreme Court of the United States

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OCTOBER TERM 1979

NO. 79-1880

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT

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THE OPINION BELOW

The opinion of the Supreme Court of Washington is reported at 92 Wn.2d 656, 601 P.2d 494 (1979) as The Department of Natural Resources, et al. v. Thurston County, et al., reversing the trial court. The Appendix to this statement is in a separate volume and is where the opinion appears (App. A, A-184).

JURISDICTION

1. This is a civil action brought by the appellant[1] against the appellee, Thurston County and Thurston County Board of Commissioners acting individually or as a Board, for having either exceeded their lawful authority without due process of law under the Fourteenth Amendment, or if having had such authority under the platting and subdivision laws and the State Environmental Policy Act of 1971 (SEPA) then those laws were in violation of the Fifth and Fourteenth Amendment of the United States Constitution. The appellant after having exhausted its administrative remedies in hearings before the Thurston County Commissioners and an

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[1] The State of Washington through its Department of Natural Resources, a co-party to the proceedings below has filed with this Court a separate Petition For Write of Certiorari entitled: Department of Natural Resources of The State of Washington, et al., Petitioners v. Thurston County, et al., Respondents.

appeal before a state board of appeals, the Shorelines Hearings Board, wherein it obtained a judgment in its favor that the platting and proposed use of its property complied with the environmental laws and regulations limiting its use, continued to trial an action of review of the Commissioner's first decision on those issues and commenced a separate action for peremptory mandamus relief after the appellees did not appeal the Shorelines Hearings Board decision. On consolidation of the judicial review action and the mandamus action, it obtained an interim mandamus order requiring the appellees to grant approval of its preliminary plat and permits for its development, reserving trial court jurisdiction of issues of constitutional liability, damages and compensation and trial of causes of actions for relief by the appellant. The appellees appealed and the Supreme Court of Washington (Supreme Court) reversed the trial court's decision. The appellant alleged that the actions of the appellees and the Supreme Court were in

violation of the procedural and substantive rights of due process of law guaranteed to the appellant by the Fourteenth Amendment and resulted in its private rights of liberty of choice, use, ownership, enjoyment and disposal of its property being taken for public use without just compensation under the Fifth Amendment, or as prohibited by Article I Section 16 of the state constitution for which it was entitled to mandamus relief and trial on those issues of liability for damages or compensation together with trial of its other causes of action cut off by the acceptance of appellate jurisdiction and the decision of the Supreme Court.

2. The judgment of the Supreme Court became final as to that court terminating review on Feburary 20, 1979. the Notice of Appeal to this Court was timely filed on May 13, 1980. Mr. Justice Rehnquist extended appellant's time to docket the appeal in this Court to May 28, 1980.

3. Jurisdiction of this Court is invoked by Title 28 U.S.C. Sec. 1257 (2). The Court has

jurisdiction first under the issue of the Fourteenth Amendment in that the Supreme Court determined the state platting statute and/or its Environmental Policy Act of 1971 were with procedural and substantive due process of law when the thrust of the issues raised throughout the administrative proceedings in Thurston County in processing the application of plat approval and effort of the appellant to obtain permits to use its property was that either Thurston County constitutionally without due process of law exceeded their statutory and constitutional authority delegated to them, or otherwise the statutory and regulatory authority delegated to them was in violation of the due process rights of the appellant protected by the Fourteenth Amendment.

The Court likewise has jurisdiction on the issue if whether the private property of the appellant has been taken for public use without just compensation by an exercise of regulatory

police powers of the state by the appellees prohibited by Article I Section 16 of the state constitution or Amendment V as a violation of the due process clause of the Fourteenth Amendment.

Whereas, the issues raised on this appeal insofar as the appellant has claimed a cause of action for damages and relief against the appellees for having exceeded their procedural and substantive authority without due process of law in violation of the Fourteenth Amendment may only be considered by this Court in the exercise of its discretionary certiorari authority, on the other hand, case law amply sustains that this case should be heard on appeal of the decision made by the Supreme Court on the issues that the state platting statute and SEPA, as found by the Supreme Court, constitutionally delegated regulatory police powers to the appellees that did not result in private property having been taken for private use without just compensation.

As an exercise of discretionary review by this Court the appellant cites: Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979); Davis v. Passman, ___ U.S. ___, 60 L. Ed. 2d 846, 99 S. Ct. ___ (1979); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Armstrong v. United States, 364 U.S. 49 (1960); Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1948); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Causby, 328 U.S. 256 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Lee, 106 U.S. 196 (1882).

As an exercise of appellate jurisdiction by this Court the appellant cites: Agins v. City of Tiburon, U.S.S.Ct. No. 79-602, October Term, 1979; Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Moore v. City

of East Cleveland, 431 U.S. 494 (1977); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article VI: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; . . .".

Fifth Amendment: ". . . nor shall private property be taken for public use, without just compensation.:

Fourteenth Amendment: "SECTION 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Constitution of Washington

Article I
Declaration of Rights

Section 1. Political Power. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Section 3. Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

Section 12. Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Section 16. Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.

Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Article II

Section 1. Legislative Powers, Where Vested. The legislative authority of the State of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

Article XI
County, City, And Township
Organization

Section 11. Police and Sanitary Regulations. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

All relevant records of proceedings below are set forth in a separate bound volume as Appendix A.

Statutes are Appendix B and regulations are Appendix C.

QUESTIONS PRESENTED

1. Were the quasi-judicial decisions of Thurston County and the judicial decisions of the Supreme Court made in excess of procedural or substantive authority granted by the State of Washington and therefore in violation of the rights of Lake Lawrence, Inc., guaranteed by the Fourteenth Amendment?
2. Did the court below violate rights secured under the Fifth and Fourteenth Amendments by resolving the taking issue against Lake Lawrence, Inc. without the benefit of an evidentiary hearing in the trial court on its causes of actions against Thurston County, et al?
3. Was the court below in error when determining if whether the rights of the appellant to own use, enjoy and dispose of its property were taken for public use without just compensation as protected by the Fifth and Fourteenth

Amendments of the United States Constitution when employing as an exclusive criteria a "balancing" test of public versus private economic values without consideration of other factors including the justness and fairness of Thurston County's actions, the intent by which they were employed and the accumulative effect upon those rights by the means employed?

4. Does Thurston County's ad hoc interpretation of "public interest" under either state platting or environmental laws amount to improper retrospective amendment of duly adopted zoning regulations for Wood Point in violation of the Fourteenth Amendment Due Process Clause and Equal Protection Clause?

5. Assuming the procedural and substantive validity of the land-use restrictions imposed by Thurston County, does application of those restrictions which favor assumed eagle-use of perch trees in areas of the appellant's property, to the exclusion of human activity

on that property, result in uncompensated private property having been taken for public use prohibited by Article I Sec. 16 of the State of Washington Constitution or the prohibitions of the Fifth Amendment, and therefore a violation of the Fourteenth Amendment of the United States Constitution?

6. Has Thurston County deliberately discriminated against Lake Lawrence, Inc. in violation of the Equal Protection Clause of the Fourteenth Amendment by arbitrarily ignoring area-wide land use regulations which allowed similarly situated lands on the shores of Lake Lawrence to be platted and developed as residential home sites while denying similar land use rights to appellant and thereby result in property being taken for public use without just compensation?

7. Are damages or compensation, including reasonable attorney's fees, awardable for violations of the Fifth and Fourteenth Amendments in this case?

8. Are either or both of the state platting statutes and the State Environmental Protection Act that the State Supreme Court decided authorized Thurston County to deny plat approval, and issuance of permits to subdivide, use, own and enjoy its property, unconstitutional in violation of the rights of Lake Lawrence, Inc. as protected by the Fifth and Fourteenth Amendments of the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

In the fall of 1976 Lake Lawrence, Inc. acquired from its president, as Lessee, an assignment to a 55 year term leasehold estate that he had just acquired in 14 acres of inimproved land fronting on Lake Lawrence in Thurston County by being a successbul bidder for lease of that land from the state.[2] Subsequently the corporation

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[2] The fee title to the land is owned by the State of Washington and administered in trust for the benefit of the educational needs of the University

acquired another leasehold estate from the state of the submerged lands beneath the water a distance of 100 feet for the purpose of construction of a private community pier into the lake for residential use.

The president and the corporation were led by the state and county to believe that the land could be subdivided into single family home-site lots, that a private community pier could be constructed on the waterfront, and the property be owned, used, enjoyed and disposed of by sublease to others for those purposes. The state agency leasing the property filed a statement of "non-significance" (App. C A-317) that the leasing of the property for those purposes was not a "major action" that

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[2] Continued
of Washington by the Department of Natural Resources. It has filed a petition for writ of certiorari to this Court. It did not appear in administrative proceedings occurring in Thurston County. It filed a response to the draft EIS as an agency having special expertise under SEPA regulations favorable to the project proposed by the appellant (App. C. A-345). It also appeared as a co-party with the appellant in all Shorelines Hearings Board proceedings and all court proceedings.

would have a "significant adverse impact on the environment" to require environmental impact statements (EIS) to be prepared by it to make a decision to lease those properties as required by the mandate of the State Environmental Policy Act of 1971 (SEPA) and the Washington Administrative Code (WAC) guideline regulations. (SEPA, App. B A-266: WAC, App. C A-315)

Prior to leasing the shorelands the president attempted a "presubmission conference" as required by the platting and subdivision regulations of Thurston County (App. C A-302) as a condition to submitting a preliminary plat application and become informed by county planning department officials what "pertinent information" was needed to obtain the right to subdivide the land as permitted by the lease. He was misled from information received at that conference that the land classified and designated as being in a "Rural Environment" (App. C A-373) could be subdivided into two lots per acre with some allowance for buffer areas and could be developed and used

for single family residency: provided the preliminary plat complied with the Thurston County Shoreline Master Program regulations that implemented the policies of the Shorelines Management Act of 1971 (SMA) (App. C, A-366; App. B, A-280).

After leasing the submerged lands the corporation was likewise led to believe that such community private dock was favored in place of numerous docks to each lot along the shorelines of the lake (App. C, A-365). The planning department officials had no information that there was any special environmental factors to consider so long as the preliminary plat and proposed use complied with configuration and size of other residential lots surrounding the lake designated as being in the same "Rural Environment" classification as the property leased. The purpose of the "presubmission conference" was to: " . . . eliminate as many potential problems as possible in order for the preliminary plat to be processed without delay." (App. C, A-302.)

Lake Lawrence is a shallow, inland, circular lake with depths of not more than 30 feet and approximately one-half square mile in size (App. C, A-377). It is one of a number of small lakes in Thurston County (App. C., A-378) located within approximately ten miles from the heaviest population center of the "urban core" of the state capital of Olympia (App. C, A-406). By 1976 its shorelands as well as those of other lakes near the center of population of the county, had been subdivided into lots and improved for use as permanent or recreational single family residency.

Wood Point, named by the appellant, is located on the south shore of a point on the lake next to a large acre parking lot to its west with a boat ramp on the lake maintained by the state fisheries department who stocks the lake annually with trout for fishing by the public for whom the parking lot and boat ramp is maintained. A county road enters from the west and terminates at the parking lot. Continuing west between the lake and road and around approximately two-thirds of the remainder of

the lake; except for another point that projects into the lake on its west shoreline, all of the shorelands have been subdivided, improved, or are being improved, with single family homes. Numerous privately owned piers extend from lots into the lake. The area described was classified and designated by map to be in the "Rural Environment" (App. C, A-377) by the master program regulations of Thurston County. The point on the west boundary and an area on the east boundary of the lake continuing to the east boundary of Wood Point was classified and designated to be in the "Conservancy Environment" by the master program regulations.[3]

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[3] All shoreline waters in Thurston County on lakes and streams were designated by maps to be in either the "Urban", "Rural", "Conservancy" or "Natural" Environment by the county having made in cooperation with the state an inventory, assessment and identification of the environment values area-wide to protect the natural environment, including wild life, along the shores of those areas. The "Urban" and "Rural" environmental classification regulations give no heed to the protection of wild life to lands designated in those classifications (App. C, A-352--377).

Human activity enjoying the lake waters occurs throughout the year which includes fishing, swimming, boating, waterskiing and duck hunting. Northern bald eagles have frequently been observed visiting the lake and other lakes near the "urban core" to perch on trees and feed on fowl, fish and animals from their shores and waters.[4]

Following the "presubmission conference" and commencing in January, 1977, Lake Lawrence, Inc. made application for approval to subdivide its property and obtain environmental shoreline permits and SEPA approval for the subdivision and the construction of a private community pier similar to the existing uses being made by other property

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[4] Northern bald eagles migrate along the Pacific Coast from the Alaska panhandle to northern Oregon. At the time the EIS documents were prepared in this case they had not been placed by the federal or state government as being in either the "endangered" or "threatened" status in Washington. The only reference to their status as being "endangered" birds appears not in the EIS documents but in the Comprehensive Plan, a plan for future legislation not implemented by any ordiances and not identifying any area or standards or specifications for how they were to be protected (App. C, A-378).

owners as single family residences around the designated in the same "Rural Environment" classification. It first proposed a subdivision of 27 residential lots. Upon continuing and successive demands made by Thurston County that areas should be set aside free from human activity for the protection of the habitat of eagles using the site, the appellant twice re-engineered its plans to obtain staff approval by first modifying the subdivision to 24 lots (fourteen waterfront and ten back lots) and then to 22 lots (twelve waterfront and ten back lots), setting aside two waterfront lots to be free from human activity. The appellant incurred considerable expense for payment of attorney's fees and costs of engineering and studies made by biologists as experts in the field of wild life environment, particularly eagles. During that time Thurston County rejected each proposal made by the appellant to use its property and each time made more demands that more area be set aside free from human activity so as not to disturb the visiting eagles. The last demand

included that the entire shoreland 200 feet back from the shoreline be set aside for eagles' exclusive use. The staff rejected the construction of any dock on the shorelines.

The first decision of the Commissioners was made September 28, 1977 (App. A, A-30) on the last staff recommendation of September 21, 1977 that the property be rezoned by designating it to be in a "Natural Environment" that permits only one home site. None of the shorelands surrounding the lake are in that zone. The staff's recommendation was based upon information obtained after the environmental documentation required by SEPA regulations had been completed, published and circulated contrary to specific SEPA regulations (App. C, A-334, 343, 344, 347).

A staff member had obtained on his own initiative, extra environmental information from the state game department in a letter recommending that a 200 foot area upland from the shoreline be set aside free from development and use based upon a graduate's thesis study of the flight response of

eagles from human disturbance when perching on trees to feed on salmon from a river and their view was protected from human activity by a canopy of trees and vegetation below where they were perching. The hypothesis for using such a study was that Lake Lawrence (described by one biologist as a "put and take" fishing lake) supplied food for the eagles necessary for their survival and that eagles were "nesting" or "roosting" in the area.[5] The

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[5] Local government quasi-judicial hearings and decisions are not subject as "state agencies" to the due process protections of the State Administrative Procedure Act (App. B, A-260). The extra-environmental information was introduced into the record by Thurston County that eagles were nesting or roosting in the area and was subsequently proved false in the Shorelines Board de novo quasi-judicial hearings protected by that act. Thurston County has no active eagles" nests or roosting sites. The nearest eagles' nest is in Pierce County on the Fort Lewis artillery firing range. At the time one of the most knowledgable biologists on eagles was Mr. Anderson, employed by Weyerhauser Timber Co., who was unwilling to testify at the county hearings because of company policy but testified at the Shorelines Board hearings subject to subpoena power and accounted for a large roosting site of eagles near Klamath Falls, Oregon and how the company had installed a perching site of bare poles unprotected by any canopy near a freeway so that eagles could feed from a lake in town when a lake near their nesting and roosting site had frozen over.

appellant served and filed on each commissioner a response objecting to the staff's recommendation on statutory and constitutional grounds which were disregarded by the first decision made by the commissioners (App. A, A-1; A-30). The first decision neither rejected or denied the application for the shoreline permit to construct the pier (App. B, A-288).

After the first decision the appellant appealed the environmental decision of Thurston County to the Shorelines Hearings Board (App. B, A-295) as to compliance of the preliminary plat with SEPA and SMA environmental regulations in subdividing the property and being used for single family residence as was last proposed by it for 22 lots where two lots were set aside for the exclusive use of eagles upon the continuing and succesive demands that were made on the appellant by the county planning department ouside of SEPA process. That proposal likewise proposed to create islands around most of the highest trees that Lake Lawrence, Inc. caused to be surveyed and marked to

identify areas where eagles perched which the appellant proposed to the staff, upon its demands after DEIS documentation had become final, to mitigate theoretical harm to eagles' response from human activity by leaving them standing with the canopy below to be undisturbed through restrictive covenants to prevent human intrustion into those areas. Setback of homes from the shoreline were likewise proposed and timber counts were made to satisfy demands by the county so that as little time would be removed as feasibly possible.

On March 23, 1978, the appellant obtained a decision from the Shorelines Hearings Board in its favor (App. A, A-57). Since Thurston County in its first decision had not acted upon the application of the appellant for granting a shoreline development permit for the pier, the Board refused to accept jurisdiction to decide that issue and only decided the issue if whether the preliminary plat subdivision and development and use of the property for single family homesites complied with both SEPA and SMA and their implementing county regulations.

after the commissioner's second decision in May, 1978 (App. A, A-69), where they first made written findings and conclusions and a decision[6] not to grant a permit to construct the pier, the appellant appealed that decision to the Board, the Board continued de novo review to await the decision of the Supreme Court, and because of the Supreme Court's opinion authorizing the county commissioners to have paramount authority under SEPA to preempt the Board's decision, has now discharged the appeal of that decision without argument of the appellant. It is apparent that if the Board ruled in favor of the appellant, Thurston County is authorized to deny the permit and preempt the

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6 After the decision the Supreme Court held that local government must make written findings and conclusions of law to support their decision without stating if whether the grounds for doing so was due process of law or was necessary to satisfy the burden of proof that is imposed on "decision-makers" by case law to show that they complied with SEPA mandates. (See Supreme Court Decision, App. A, A-191.)

Board's decision on the same subject matter by its SEPA checkmate authority as was decided by the Supreme Court in favor of Thurston County on the platting issue.

After the first decision of Thurston County the appellant appealed to the Superior Court the platting decision as to compliance of the preliminary plat with the platting laws, and SEPA environmental decision making consideration riding piggy-back of the platting decision under the platting laws and shorelines permits decision (App. A, A-32).

Review was accepted by the trial court (App. A, A-43), and a petition of prohibition was granted against Thurston County from rezoning the property (App. A, A-43). Trial was set on the review to a time to await the decision of the Shorelines Hearings Board, which if not in its favor, the appellant would have to appeal its decision within 30 days and join it with its cause of action for review of the Commissioner's first

decision (App. A, B-264).[7] The petition for review and prohibition with affidavits cited the statutory laws for grounds to grant such review and prohibition which include the constitutional violation of rights of the appellant (App. A, A-39). The order of show cause against the appellees recites those constitutional grounds (App. A, A-41). Upon the order being granted that the administrative record of Thurston County's first decision be reviewed (App. A, A-43), Thurston County caused to be filed that record in trial court that included the constitutional objections made in the response of the appellant to the first decision being entered if the Commissioners followed the staff recommendation of September 21, 1977 (App. A, A-1).

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[7] While the appellant would have had to appeal the Shorelines Hearings Board decision so as not to be denied a shorelines development permit and approval of its plat, local government need not appeal the Shorelines Hearings Board decision as being above that law as "independent" SEPA "decision-makers" under the Supreme Court opinion, infra.

After the Shorelines Hearings Board decision was made in favor of appellant on March 23, 1978, in April and May, 1978 a series of events occurred whereby through the actions of Thurston County, out of court while being adversary parties without any SEPA procedural or statutory platting authority to do so,[8] the appellant was finessed out of its constitutional rights as claimed in this appeal. While a trial date was set for April 17, 1978 to April 20, 1978 (App. A., A-43), Thurston County, on Thursday, April 5, 1978, filed and had set for hearing on Monday, April 10, 1978, in Olympia in the Superior Court review proceedings, a motion

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[8] The trial court found that the County had not "supplemented, altered or amended" its EIS documents, infra. State law and county regulations require that "alternative" uses must appear in the EIS records and that the "responsible official", the Thurston County Planning Director, is responsible for identifying the environment (See App. B, A-267); App. C, A-312).

to the court to have the administrative proceeding record of its first decision returned to it and the trial date changed to July 6th and 7th, on grounds for time for it to decide if they would either grant the approval of the plat and issue the shorelines development permit for it, or contest the Shorelines Hearings Board decision as "clearly erroneous" (App. A, A-44).

Subsequently they did neither: they played a low card, ultimately holding the trump card in their favor: their claim of "independent" authority. The motion was received by the appellant's attorney on Friday, April 7, 1978, for a hearing already scheduled in Olympia, 75 miles away, on Monday. The appellant's attorney, out of the office, immediately caused to be dictated on that Friday, through his secretary, a motion that the record be returned to the court, that was filed in court on April 12, 1978, and alleged that the appellant was being deprived of its judicial rights of due process of law (App. A, A-51).

On April 10, 1978, without the appellant being represented or having had the opportunity to be represented, the court granted the motion returning the record to Thurston County and ordered that: "any appeals in this matter, either from denial of the plat or the decision of the Shorelines Hearings Board be consolidated and heard by this court on July 6th and 7th, 1978" (App. A, A-46). The appellant was not appealing the decision of the Shorelines Hearings Board and had already appealed the first decision (App. A, A-43). On that same Monday Thurston County acknowledged receipt of the record and, unbeknown at the time to the appellant, its commissioners met on that same day at Wood Point where there was gathered a small group of people protesting the decision of the Shorelines Hearings Board and the opinion of one of the commissioners was reported to say that their first decision was correct in requiring an area of 200 feet along the shorelands of appellant's property be free from human activity for the exclusive use of eagles (App. A, A-49.

On April 18, 1978, on the commissioner's own setting following the site investigation, a public hearing was held purportedly to decide if to appeal the Board's decision or grant approval of the plat and shorelines permit. On that basis the appellant was lulled into appearing but when the commissioners opened the hearing to testimony from the members of the public local to Wood Point as to the harm that would result by the project's disturbance to the eagles, counsel objected to the proceedings and withdrew. On May 28, 1978, after the Shorelines Board decision became final, the commissioners played their trump card and made their second decision by filing written findings, conclusions of law and the decision in the review proceedings without having done what was represented to the court and to appellant's counsel by them would be done, appeal the Board's decision or grant approval of the plat and issuance of the shoreline

permit (App. A, A-71).[9] The first stage of the finesse had been completed.

Prior to that decision the appellant had caused to be filed on April 12, 1978, a motion for return of the record to the court in the plat proceedings (App. A, A-51), which was granted on April 17, 1978, ordering Thurston County to return the record by April 27, 1978 (App. A, A-54). It was not returned by Thurston County until May 31, 1978 (App. A, A-71). When it was returned it was not the same record. It had been supplemented by Thurston County adding to it all of the Shorelines Hearings Board's records after that Board's decision had become final (Book V through Book XII) and the record of the county's own proceedings when making its second retrospective decision. The second stage of the finesse was completed. The appellant, realizing what was about to take place

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[9] See App. B, A-278; App. C, A-309.

by the commissioner's out-of-court written findings and conclusions being placed of record to circumvent the Board's findings and conclusions, which the county had not appealed, instituted special mandamus proceedings (App. B, A-255) in a separate action (App. A, A-94), for a peremptory writ to compel the county to have the plat approved and the shorelines permit issued based upon the Shorelines Hearings Board's findings and conclusions and the county's admissions that the plat complied with the platting statutes and regulations (App, A, A-81). In the affidavit for the application for such writ was set forth that it had incurred $40,000.00 caused by the denial of the use of the land and shall suffer irreparable damages by way of a change of economic conditions, condemnation of the ownership of its use without compensation and without due process of law, and denial of the use of the land for which there is no adequate remedy (App. A, A-106).

On July 6, 1978, the trial date occurring and without the superior court having granted approval

or denial of the record having been supplemented by Thurston County, the parties agreed by a signed stipulation ratified by court order that prior to the trial continuing there should be a decision on whether or not Thurston County on not having appealed the Shoreline's Board decision had on April 24, 1978 "constitutional and legislative authority" to do the following:

> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle habitat) having already been presented to the Shorelines Hearings Board;
> (b) Make a decision on the record before the Shoreline Hearings Board and the evidence at a new public hearing contrary to and in conflict with the prior Shorelines Hearings Board judgment on the same matter;
> (c) Enter Findings of Fact, Conclusions of Law and Judgment contrary to and in conflict with the Shorelines Hearings Board judgment of march 23, 1978.

App. A, A-107.

The separate mandamus proceedings were consolidated with the review proceedings and the granting or denial of the peremptory relief to the appellant requiring Thurston County to approve the

plat and issue the shoreline permit and a hearing on the damages or compensation was set over for decision by visiting Judge Pitt (App. A, A-110).

Judge Pitt on a decision on the record entered a memorandum opinion on August 11, 1978, in favor of the appellant (App. A, A-113). On September 25, 1978 the court filed its Findings and Conclusions on issues in favor of the appellant (App. A, A-118). Among the findings of fact the court noted:

(1) That the appellant had acted in reliance on the lease and the designation of the property as being in the "Rural Environment";

(2) That the Shorelines Board after a contested hearing had considered all environmental impacts that Thurston County claimed to be applicable to use of the property;

(3) That the environmental impact statements had not been "supplemented, altered or amended by Thurston County",[10] the author and sponsor of

[10] See Footnote 7, supra.

said document as "lead agency"; that the county had elected not to appeal the Board's decision;

(4) That on April 10, 1978 the Commissioners conducted a site inspection and commented on the Board's decision;

(5) That the Commissioners specifically found that the proposed project on Wood Point met all platting requirements and their decision regarding public interest in the environment was considered and decided by the Shoreline's Board decision;

(6) The Commissioner's decision is inconsistent with the Shoreline's Board findings that Wood Point is only an incidentally used perch area for eagles and is not critical or important to their habitat needs; and

(7) That the Commissioners had not granted approval of the plat and issuance of the permit as an "alternative" by further conditioning its use, but conditioned such "alternative" use being

granted only if the court's decision was not in its favor.[11]

From those facts the court made the following conclusions:

(1) The appellant had no adequate remedy at law;

(2) The court had jurisdiction over the parties;

(3) The "public interest" clause in RCW 58.17.110, App. B, A-277, "as applied" by Thurston County was unconstitutionally vague and violates the due process clause of both the State and Federal Constitutions;[12]

(4) that the "public interest" clause under the platting statute does not grant authority to deny the plat on environmental grounds, but that authority is derived from SMA and SEPA;[13]

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11 Compare with Supreme Court, App. A, A-199.

12 Compare with Supreme Court, App. A, A-197.

13 Compare with Supreme Court, App. A, A-198.

(5) The refusal to grant a substantial development permit after the Shorelines Hearings Board decision had become final is unlawful. Thurston County had no authority to "moot" the decision of the Shorelines Hearings Board decision that had already been litigated before the Shorelines Board.[14] The legitimate purposes of the State Environmental Act would be subverted by such action;

(6) The appellant is entitled to approval of the plat and issuance of a shorelines permit for it;

(7) The appellant has a right to rely on the "rural" designation of the property and the decision of the Shorelines Board;

(8) That applying a balancing test of the public interest in "legitimate governmental regulations" of the use of property versus the rights of the appellant in its proposed use of Wood Point

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[14] Compare with Supreme Court, App. A, A-197.

does not justify denial of the proposed plat, and "would" constitute an unconstitutional taking.

On September 21, 1978, the court entered an order in adjudication of the mandamus and review proceedings remanding the case to Thurston County to promptly grant the substantial development permit and approve the preliminary plat in compliance with the court's findings and conclusions, reserving jurisdiction, and reserving for a later hearing "any issues" of the Thurston County's "liability for damages to the plaintiff and the amount thereof (App. A, A-124).

On September 26, 1978, a hearing was set for damages on November 20th and 21st, and the appellant amended its petition for damages, setting forth as causes of action for loss a violation of SHB, the Shorelines Board decision, the platting statute, SEPA, the Fifth and Fourteenth Amendments of the United States Constitution, constitutional violation of the State of Washington, causing damages for temporary taking of $102,280.84 (App. A, A-125, 126-146).

The Amended Petition of the appellant alleges for constitutional violation of rights, unlawful action in tort, mandamus damages and special statutory damages under SMA. The complaint also alleges damages for future losses.

Thereafter on September 28, 1978, Thurston County appealed the order of Judge Pitt, obtained from the court of appeals a supersedeas without posting bond, an order temporarily staying the trial court's order, and a permanent order staying the order and further proceedings in trial court pending appeal. The court of appeals certified the case to the Supreme Court and formulated issues of liability of Thurston County that had not been fully decided by trial court (App. A, A-145-152).

The appellant filed in the Supreme Court a motion for discretionary review claiming that the powers of the trial court had been usurped when it reserved jurisdiction of the case; that the appeal was contrary to the stipulation entered into between the parties and argued that the result of

the appeal being granted denied the appellant a complete and fair trial on the issues of liability and damages in that the appeal is premature, preempts the jurisdiction of the trial court by appellate jurisdiction and denies access of trial to the record on review (App. A, A-153-182). On November 17, 1978 the motion was denied and the stays continued (App. A, A-183).

On October 4, 1979, the Supreme Court opinion was filed (App. A, A-184). It held as follows:

1. That the argument of the appellant that first decision of the commissioners denying the plat upon the staff's recommendation that 200 feet of the shoreland be set aside free from human activity for the exclusive use of eagles did not constitute an attempt at "spot" rezoning of the property by attempting to rezone the property from "rural" environment to "natural" environment as a violation of due process in that the comprehensive plan "governs" the use of the property and the change would not constitute a classification

different from and inconsistewnt with the classification of surrounding land. (Footnote 2, App. A, A-189.)

2. That the Commissioners are not bound by the Shorelines Board "finding", and that they have "independent authority" under SEPA to consider the environmental issue and deny the plat for environmental reasons. "We further hold that denial of the plat in this case does not violate respondent's rights to due process, or constitute a taking of private property for public use without compensation". (App. A, A-192.)

> 3. In summary, the environmental determinations mandated by SEPA are uniquely related to the particular decision being taken, and are conclusive only for that purpose. [i.e. Shorelines Board's decision, App. A, A-__]. They are not binding on other decision-making bodies. To hold otherwise would allow one decision-making body considering a related question to evaluate a particular environmental issue, and would foreclose independent analysis and deliberation. Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values. See RCW 43.21C.030.

(App. A, A-197.)

4. The trial court held the Commissioners' determination that approval of the plat was not in the "public interest" was an unconstitutional vague application of the platting statute. Since we are not concerned here with a regulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standard, the vagueness doctrine as such is not applicable. . . . As noted above, the Commissioners' authority to deny the plat on environmental grounds derive essentially from SEPA, and not from the platting statute alone.

   The validity of SEPA as a delegation of substantive legislative authority to apply its standards in a particular case was specifically upheld in Polygon Corp. v. City of Seattle, supra at 66. the court held that SEPA provides constitutionally adequate guidelines for governmental decision-making under the act, and that procedural safeguards are adequate if an opportunity to be heard is provided, and judicial review of the entire record is available. That is the case here. We therefore conclude there is no constitutional objection to the Commissioners' exercise of their authority under SEPA to deny the plat on environmental grounds. [App. A, A-197-198]

5. The determination whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interest against the public interest in imposing the regulation in question. . . . In considering the encumbrance on the property owner, the court will consider both the type of encumbrance imposed and whether the owner is thereby prevented from making a profitable use of the property.

> Of crucial importance in this case is the fact that the Commissioners' decision to deny the plat leaves open the possibility of approving a less dense development of Wood Point. The Commissioners have consistently maintained they would entertain an application for a plat which provides an adequate buffer zone for protection of the eagles' preferred perching and feeding areas. It should be noted that the Commissioners did not find any adverse impact from development of eleven of the proposed lots. Moreover, the findings provide specific guidelines for planning a buffer zone the Commissioners would find acceptable. Finally the decision left open the possibility of an alternate cluster configuration for the development--a configuration specifically favored by the County's Comprehensive Plan.
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> The facts apparent from the record in this case do not support a conclusion that 'there is not present, possible, and reasonably profitable alternative use to which his property is adaptable'. Carlson v. Bellevue, 73 Wn.2d 41, 51, 435 P.2d 957 (1968). [App. A, A-198-200]

On November 13, 1979, the appellant filed with the Supreme Court a motion for reconsideration (App. A, A-202). It was denied on February 20, 1979 (App. A, A-245). Prior to its denial the appellant also filed a statement of additional authorities (App. C, A-442).

In the motion the appellant attacked the opinion on the basis that the Supreme Court had not

answered one of the fundamental issues presented by the case, that is, if whether the Commissioners "had constitutionally exercised statutory authority that was delegated to them, or conversely, had unconstitutionally exceeded their authority without due process of law when they exercised their authority under the guise of having "independent" authority under the platting statutes or SEPA by the process the Commissioners employed in:

(a) obtaining the judicial record;

(b) making an investigation at the site in the presence of objecting neighbors;

(c) conducting hearings in an atmosphere of hostility and hearing from the same people who had been objecting to the project;

(d) entering out of court findings, conclusions of law and a second decision and them supplementing and "salting" the trial court's judicial record,

when that was done without an order of the court while not appealing the Shorelines Board decision

and being adversary parties to the judicial proceedings in trial court in review of their first decision (App. A, A-230). The appellant brought to the court's attention that the application for mandamus had alleged:

> There are no issues of fact or of law to be decided by the Court, and the petitioners are entitled to a Peremptory Writ of Mandamus in accordance with its proposed Writ hereof, and in compliance with the decision of the Shorelines Hearings Board of March 23, 1978, which the respondents, in violation of the law, have circumvented, and declared to be "moot", and based their decision upon subjective standards of their own making and without reference to either the substance or procedure of the environmental law of the State of Washington and Thurston County.

The appellant in its motion specifically made known that the Commissioners by their actions were and had circumvented the procedural mandates required for contesting the findings and conclusions of the Shorelines Hearings Board decision in accordance with the statutory mandate of RCW 34.04.030 (1) (App. A, A-264). Likewise the appellant made known that the Supreme Court was without original jurisdiction to accept review on

the basis of "illegitimate" use by Thurston County of appealing the interim mandamus order of the trial court to contest in the Supreme Court the Shorelines Hearings Board decision (App. A, A-207).

The appellant alleged that the primary basis of the authority the Commissioners exercised was to achieve the policies and goals not of SEPA and SMA but of the Thurston County Comprehensive Plan, a plan for future legislation, not implemented by ordinances with specific standards and specifications and designating land to which it applied (App. C, A-378-419). In effect the appellant argued that by Thurston County having done so they were making laws on an ad hoc, piecemeal basis, without due process of law and in violation of appellant's rights under the Fourteenth Amendment that resulted in private property being taken without just compensation for public use of an eagle preserve.

The appellant likewise argued that actions of Thurston County were without due process of law, but an arbitrary and capricious exercise of quasi-judicial authority unfairly used by the methods

they employed to make their second decision. It is sufficient to say that the motion and the additional authorities set forth substantial constitutional issues that not only the Commissioners exceeded their constitutional authority but also the Supreme Court of Washington without precedent of their previous decisions.

Before the Supreme Court had denied the motion for reconsideration fo the appellant, Thurston County commenced proceedings to change the environmental zoning of the property from "Rural" to "Conservancy". The appellant made a motion and application for a writ of prohibition against such action (App. A, A-232). It was denied by Supreme Court order on December 13, 1979 (App. A, A-243). Mandate of the Supreme Court terminated Supreme Court review on February 20, 1980 (App. A, A-246).

On March 19, 1980, the trial court indicated by letter that in view of the Supreme Court's decision there seemed to be no question that judgment should be entered in favor of Thurston

County (App. A, A-248). On April 2, 1980, judgment was entered in favor of Thurston County; the finesse had been completed (App. A, A-249).

Notice of Appeal was filed and served on May 13, 1980 (App. A, A-251). On May 16, 1980, Mr. Justice William H. Rehnquist granted the application of the appellant for time to docket the appeal to and including May 28, 1980 (App. C, A-425).

QUESTIONS ARE SUBSTANTIAL AND OF WIDESPREAD IMPACT[15]

Introduction

The questions presented for review are substantial and of widespread, constitutional importance to the individual rights of liberty of a person to choose, own, use, enjoy and dispose of its private property; subject to environmental limitations imposed on its use by the state for protection of the natural environment on its

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15 Agins v. City of Tiburon, United States Supreme Court No. 79-602, October Term, 1979.

property, and how those rights are to be determined by a court as to issues of fact or law, arising on separate causes of actions against the appellee under the Fourteenth Amendment of the United States Constitution and Article I Section 16 and the Fifth Amendment of the State of Washington and United States Constitution.

There is the question of the constitutionality of the state's actions as to the means employed by Thurston County and its Commissioners, as being or not being with procedural and substantive due process of law, when denying the appellant by ad hoc, environmental, administrative processes and quasi-judicial, piecemeal, discretionary decisions of the Commissioners when considering the "public interest" in the environmental value of the appellant's property, to repeatedly deny to the appellant liberty of its rights to choose, own, use, enjoy and dispose of substantially all of its private property, including riparian rights to the lake waters on which it is located, as was being

made by other property owners in the area where it was located, giving rise to a separate cause of action for violations of the appellant's constitutional rights guaranteed by the Fourteenth Amendment entitling the appellant to mandamus relief and damages on its separate cause of action for having been exercised either in excess of authority delegated to the appellees by legislation, or such authority was unconstitutional in violation of the Fourteenth Amendment.

There is the question that if such repeated separate actions of the county and the Commissioners have resulted in a substantial loss of the liberty of rights of the appellant to choose, own, use, enjoy and dispose of its property as otherwise permitted to others in the area where its property was located by such use being appropriated by indirect means for a public use of eagles without payment of any compensation to the appellant, then are not such end results a separate violation per se of the Fourteenth Amendment entitling the

appellant as a separate cause of action to mandamus relief, damages or compensation against the appellee without judicial consideration if whether such actions, as distinguished from the end results, of the appellee caused such consequences as being or not being without due processes of law, since the end results are prohibited by Article I Section 16 of the State Constitution and the Fifth Amendment of the United States Constitution?

There is also the question that effects the judicial means to be employed to prove in court issues of fact and law to obtain a judicial remedy of mandamus relief, damages or compensation upon those separate causes of actions, inter alia, that the appellant alleged and proved against the appellee, when the Supreme Court of Washington determined issues of fact and law as to the liability of the appellees prior to the completion of trial on those issues of fact and law by accepting appellate jurisdiction and reversing the partial mandamus relief afforded to the appellant by the

trial court on those causes of action prior to the appellant having been afforded an opportunity in court to offer proof as to the liability for damages and compensation that may have been awarded to it for relief of those alleged causes of actions against the appellees. The end result of the Supreme Court's decision as to make the Shorelines Management Act of 1971 and the decision of the Shorelines Hearings Board meaningless in preference to ad hoc environmental considerations to be exercised independently by "decision makers" exercising judicial functions of what is or is not in the environmental "public interest" to prohibit as they decide the exercise of individual liberty of a person to choose, own, and use its private property resulting in usurption of the quasi-judicial powers legislatively vested in the Shorelines Board and the jurisdiction of the trial court to determine issues of fact and law on the liability on those separate causes of action of the appellants to obtain judicial relief for constitutional violation of its rights by the appellee.

The questions are of special significance to this court since the actions of the appellee that serve as a basis for those separate causes of actions against them arise not from an exercise of a delegation of legislative regulatory authority to them by the state but of judicial authority delegated to them by the State Environmental Policy Act of 1971 to process by administrative adjudicatory means on an ad hoc, piecemeal basis to determine the environmental value of the property of the appellant to be preserved as natural environment and delegating state authority to the county Commissioners and other officials of local government carte blanche, discretionary, judicial authority as "decision-makers" to independently make quasi-judicial decisions binding in a court of law as to what areas of property the liberty of a person may not choose to own, use, enjoy and dispose of its private property without being required to determine if such prohibited use is being made by others in the area where the property

is located, and to prohibit such permitted private uses as they may retrospectively decide by check-mating prior legislative decisions already made under the Shorelines Management Act of 1971 on the same subject matter area-wide that permitted the use for which the appellant choose to use its private property.

It is claimed that the doctrine of the separation of powers, devised by the framers of the United States and State of Washington Constitutions to protect individual liberty from the exercise of governmental police powers by dividing those powers and granting each branch of government separate limited powers of government to check the powers of each by separating their functions, that otherwise would not be protected if all three powers were exercised by one, has been subverted and corrupt by the environmental legislation of SEPA delegating legislative authority as a judicial function to local governmental "decision makers" to determine "independently" of one another by exercising

judicial authority when making quasi-judicial decisions on an ad hoc, discretionary basis as to what is or is not by the exercise of their uncontrolled will in the "public interest" to be environmentally protected, and by authorizing those "decision makers" to prohibit the individual of its exercise of liberty to choose, own, use, enjoy and dispose of its property as not being in the "public interest". The primary judicial function of local government processing use applications for the private use of property to determine the environmental value of that property, and predict the consequences upon its environment of the proposed use if it is permitted, is an adjudicatory, administrative function preparatory for a determination to be made by the "decision makers". The primary functions for the "decision makers" is a judicial function not to substantively determine what is or is not in the "public interest" or determine what are the other "alternatives" an applicant should be permitted to use its property by discovery of

facts on their own account, a function of legislation, but to protect the constitutional rights of freedom of individuals to use their property by following judicial, constitutional, procedural safeguards when making that determination by not determining what is in the environmental "public interest" on their own account but only with reference to the prior determinations made by legislation or strictly in accordance with what has been made known in the environmental documentation authorized by legislation of SEPA to be set forth in EIS documentation, which in the process of its making may have afforded the private property owner an opportunity to be heard and in which to participate. Here the Supreme Court of Washington has authorized SEPA powers to be exercised by the appellee as they please without reference to such EIS documentation but to the Commissioner's own unbridled determination.

So to speak with clarity by the use of a metaphor, it is claimed the decision of the State

Supreme Court has allowed the hand of the legislature to feed its meat of deciding what private activity should be prohibited to protect the "public interest" in the natural environment to the judicial watch dog of the owner who is supposed to protect its master's liberty to use his private property free from unconstitutional intrusions of the legislature. As a result the watch dog is more interested in eating the meat than in protecting his master's rights. The owner is therefore left without any judicial protection of its rights for his watch dog has become an instrument of legislation so as not to protect its master's liberty from unconstitutional intrusions of the legislature but to serve the legislature by prohibiting his master from using his property while being concerned with eating the meat from the hand from which it is fed.

This case is specially noteworthy for the court to review as a companion when reviewing Agins v. City of Tiburon where a bold, direct, judicial attack was made unsuccessfully on the

constitutionality of the city's exercise of legislative powers of "open space" zoning without prior trial of the facts constituting if whether or not private property of the appellant had been "taken" for public use without just compensation because of such legislation. Compared with this case the appellant has pursued and exhausted every administrative and judicial remedy afforded by law but has been cutoff from being authorized to use its property and being afforded judicial relief on its causes of actions in court prior to trial of its causes of actions under the Fifth and Fourteenth Amendments of the United States Constitution by the decision of the Supreme Court of Washington, even though having pursued those remedies for its property having been "taken" for public use without just compensation that the Supreme Court of California justified as being the grounds for ruling in the favor of the City of Tiburon for not having been done.

Separate Causes of Actions Entitled to Judicial Relief

The active term of "taking" does not appear in the Fifth Amendment and Article I Section 16 of the United States and State of Washington Constitutions, but the term "taken" does appear as a prohibition against private property having been "taken" for public use without just compensation and without qualification by whom or what means of process the end is accomplished. Logic, although perhaps not experience,[16] would lead one to

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16 Kaiser Aetna v. United States, 100 S. Ct. 383 (1979) at 391:

> There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even in a situation as different from the riparian condemnation cases as this one. But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.

believe that since the end is prohibited by the Constitution and the Constitution is the supreme law of the land, then no matter what means were employed by any persons acting without or within the scope of delegated authority of state law to any of the three branches of government, including adjudication, that such action per se is without due process of law,[17] if the end prohibited has been accomplished.

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17 United States v. Lee, 106 U.S. (Otto) 196 (1892) at 218:

> If this constitutional provision (habeas corpus) is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation.
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> Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such

Nor does the constitution of the United States fuse[18] the Fifth and Fourteenth Amendment by saying "private property shall not be taken for public use without payment of just compensation and without due process of law". One also would be led to believe that the determination if whether

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[17] Continued

> cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name.

[18] Moore v. East Cleveland, 431 U.S. 494 (1976), Mr. Justice Stevens:

> The holding in Euclid v. Ambler Realty Co., 272 U.S. 365, that a city could use its police power, not just to abate a speciaif use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits.
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> In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property- . . .

such ends have been achieved, being a question of fact and not of law, should entitle one to a trial in court on those facts without judicial consideration of what means or for what other purpose of government were employed to achieve the result,[19] especially when the authority is delegated to limit the extent of use of private property by public officials making discretionary, adjudicate decisions as to what is the public interest in its environment. Further, experience should tell us, as a criteria, that if the value of the private estate must be judicially measured and balanced in the heads of the judiciary against the value of the public estate in regulating the use of property before the prohibition can be found to have occurred, then by considering the public estate as to

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19 Portsmouth Co. v. United States, 260 U.S. 327 (1922); United States v. Lee, 106 U.S. (Otto) 196 (1892); United States v. Reynolds, 397 U.S. 14 (1969); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

the means employed most likely will justify the end; and that is what has been done in this case. The appellant has been quasi-judicially and judicially "balanced" out[20] without equitable

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[20] El Paso v. Simmons, 379 U.S. 497, 432 (1964), Mr. Justice Black:

> All this for me is just another example of the delusiveness of calling 'balancing a 'test'. With its deprecatory view of equities . . . the Court through its balancing process states the case in a way inevitably destined to bypass the Contract Clause and let Texas break its solemn obligation. United States Trust Company of New York, Trustee v. New Jersey, 431 U.S. 1 (1976), protected private property rights through the Contract Clause. The court has found an "implied contract" arises for payment of compensation for property "taken" for public use: United States vs. Great Falls Mfg. Co., 112 U.S. 645 (1884); Mugler v. Kansas, 123 U.S. 623 (1887) states the converse at page 663: ". . . that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

consideration[21] of its private rights of liberty[22] to use, own and enjoy its property of unknown amount free from the uncontrolled judicial authority of the exercise of quasi-judicial will of the Commissioners leaving a remaining use that has also been damaged for public use without payment of any compensation.[23] Justice Holmes' "balancing", made in an age of free enterprise and expansion when the protection of private property against being "taken" by regulation and the need for adjustments by regulations of use of private property was less than now, has now gone "too

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21 Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

22 Lynch v. Household Finance Corp., 405 U.S. 538 (1972), at 552, Mr. Justice Stewart:

> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation.

23 United States v. General Motors, Inc., 323 U.S. 373 (1945).

far" to justify the means rather than prohibit the ends.[24] It is now being used to justify regulation in an age of conservation of natural resources; when although the need for adjustments by regulation may be greater, there is then more reason the prohibition should be safeguarded by this Court, if persons in these United States are going to have any liberty to own, use, enjoy and dispose of their private property without direct and indirect appropriation of it for public use by the state through local officials, exercising quasi-judicial discretionary ad hoc environmental authority, with or without due process of

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24 Agins v. City of Tiburon, Jurisdictional Statement, pages 19-22.

laws, and be justified in court for having done so and authorized at will to do so.[25]

The problem is not a stranger; various court concepts have been used: torts, implied contracts, property law, to strike down the justification of the actions for public purposes when looking at the end results. Perhaps, nothing more can be said than the equitable principle that the end result of regulation must be "just and fair" and not unequal[26] and if not, injunctive relief and damages or compensation should be awarded. This case affords the court that opportunity.

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25 The basic assumption made by the state for the regulation of the "environment" is that the natural environment is owned by the state apart from the rights of liberty of individuals to own, use, enjoy and dispose of private property including its environmental ammenities (App. B, A-280; App. C, A-355, 392). United States v. Lynah, 188 U.S. 445 (1903); Andrus v. Allard, 100 S. Ct. 318, 327 (1979).

26 Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Kaiser Aetna v. United States, __ U.S. __, 100 S. Ct. 393 (1979); Mongahela Navigation Company v. United States, 148 U.S. 312 (1803); Gordon v City of Waren, 379 F.2d 386 (6th Cir. 1978).

The advocate for "balancing" in this case may find it difficult to resolve how public interest in the environment of wildlife can be determined on an ad hoc, piecemeal adjudicatory basis by quasi-judicial decisions of the Commissioners of Thurston County and by judicial means of the state Supreme Court to justify for consideration of the environment by those "decision makers" exercising SEPA police powers, the preemption of legislative laws and regulations, that had already area-wide protected that public interest where the eagles sly.[27] The criteria of "balancing", for employing judicial restraint as to the wisdom of state legislative regulative action to the point it is decided by judges that it has gone "too far" by

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27 Mugler v. Kansas, 123 U.S. 623, 662 (1887):

> Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department.

exclusively employing the "too far" test, has come full circle in this case when such quasi-judicial and judicial restraint was not exercised as to SMA and its local area-wide regulations authorizing quasi-judicial SEPA decisions to preempt SMA legislation and regulations on the same subject matter.

A key to this case is the opinion of Justice Holmes in the Portsmouth case where the decision of the issue of property being taken was not restrained by "balancing" as to actions of the federal government for a direct violation of the Fifth Amendment and not via the Fourteenth Amendment as a state violation when the criteria if whether private property was taken could be determined as a matter of fact, not law, by the progressive and accumulative acts of firing artillery shells over private land to indicate an intention

that the practice shall continue.[28] Factually, that in practice is what has indirectly taken place in this case, for there is every reason to conclude from the actions of Thurston County and its Commissioners -although not artillery shells, that Thurston County does not intend to allow a large part of the area of Wood Point to be privately owned, used and enjoyed by anyone.

Independent of the Fifth Amendment and Article I Section 16 of the United States Constitution there are ample facts that there has been a procedural and substantive violation of SEPA that the

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28 Portsmouth Harbor L. & H. Co. v. United States, 260 U.S. 327 (1922). Also using the same approach are: Mosher v. Phoenix, 287 U.S. 29 (1932); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), at 184; United States v. Great Falls Mfg. Company, 112 U.S. 645 (1884).

Supreme Court of Washington has authorized as being unconsitutional that are in direct conflict with this Court's decision.[29]

CONCLUSION

It is suggested that the dilemma pointed out by the appellants in the Agins v. Tiburon case where the private owner can more easily find a remedy in federal court than in state court for a violation of the property having been "taken", need not be so if this Court were to hold on the factual pattern of this case that a state's violation of constitutional prohibitions against inverse condemnation is automatically a violation of the Fourteenth Amendment of the fundamental and traditional

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29 Truax v. Corrigan, 257 U.S. 312 (1921); Eastlake v. Forest City Enterprises, Inc., 426 U.S. 608 (1976); Ettor v. Tacoma, 228 U.S. 148 (1913); Moore v. East Cleveland, 431 U.S. 494 (1976).

rights of liberty[30] of a person to own, use, enjoy and dispose of property free from unfair, unjust and unequal restrictions placed upon it by any form of governmental action without payment of compensation, and when not similarly placed upon the use of other property, entitling the owner to not only injunctive relief but relief of damages or compensation and attorney's fees upon trial of the issues of fact in court.[31] Otherwise, others may be "due processed", "balanced out", "planned-out", "finessed" of their liberty to own, use, enjoy and dispose of property by a multitude of "decision-makers" enforcing piecemeal in every nook and

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30 Lynch v. Household Finance Corp., 405 U.S. 1971.

31 Bivens v. Six Unknown Fed. Narcotics Agents, 405 U.S. 388; Davis v. Passman, __ U.S. __, 60 L. Ed. 2d 846, 99 S. Ct. ___.

cranny of every state and local government office building, laws and protective regulations purportedly protecting the present and future of a free society from harm, from individual choice and initiative in the use of private property without consideration if such decisions are unfair, unjust and unequal.

Counsel prays that probable juridiction be noted.

Respectfully submitted,

Philip P. Malone
Attorney for Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

CERTIFICATE OF SERVICE

Philip P. Malone, duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States hereby certifies in compliance with Rule 33(b) he has caused to be served on all parties required to be served herein on May 28, 1980, three sets of the Jurisdictional Statement and Appendix to Jurisdictional Statement of Appellant by personal service to the parties' attorneys or their clerks at their offices, those attorneys being:

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

OCTOBER TERM 1979

NO. 79-1880

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

APPENDIX TO JURISDICTIONAL STATEMENT

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ABCD AT CRAFTSMAN PRESS, SEATTLE

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APPENDIX A - RECORD

APPELLEE'S CONS'T, ETC., RESPONSE SEPTEMBER, 1977 PRIOR TO APPELLEE'S FIRST DECISION

RESPONSE OF LAKE LAWRENCE, INC. TO THURSTON COUNTY PLANNING DEPARTMENT STAFF REPORT AND RECOMMENDATION OF SEPTEMBER 21, 1977 FOR HEARING BEFORE THURSTON COUNTY BOARD OF COMMISSIONERS SEPTEMBER 28, 1977

SUBJECT: TOTAL PROPOSAL FOR PLATTING 22 LOTS AND CONSTRUCTION OF ONE COMMUNITY PIER ON 14 ACRES OF PRIVATE LEASE-HOLD ESTATE OF LAKE LAWRENCE, INC. AT WOOD POINT ON LAKE LAWRENCE.

REFERENCES:

(1) Application Wood Point on Lake Lawrence Case No. 225 and SH-TCO-1-77, "Total Proposal". (See Findings of Fact and Recommendations, page 28, September 8, 1977, infra.)

(2) Proposed Findings of Fact and Conclusions to Thurston County Board of County Commissioners, submitted by Lake Lawrence, Inc. September 8, 1977.

(3) Appendix of Record, with Exhibits I and II, submitted by Lake Lawrence, Inc. September 1, 1977.

(4) Transcription of Testimony of Hearing of Thurston County Board of County Commissioners, September 8, 1977 submitted herewith

identified in text as: "T", by page number in () and by line in common number without parenthetical.

The Applicant, Lake Lawrence, Inc., objects to the Thurston County Staff Report of September 21, 1977, and respectfully requests that the Board of Commissioners of Thurston County approve the applications of the Applicant by adoption of the Findings of Fact and Recommendations (Section II, pages 28 to 41 Re: (2) hereof) pursuant to submission (Section I, pages 1-28 Re: (2) hereof) of September 8, 1977. Such request is supported and substantiated by the records Appendix to Record and Transcription (Re: (3) and (4) supra) and in conformance with all laws, policies and regulations of the State of Washington and Thurston County (See Exhibit II of Re: (3) supra. for laws).

OBJECTIONS to the Staff Report of September 21, 1977, are made on the following ISSUES with responses of the Applicant to each issue following:

I.

ISSUES

1. The Staff Report of September 21, 1977, is in contradiction of the Thurston County Planning Department's Draft Environmental Impact Statement (DEIS) of April, 1977 and Final Environmental Impact Statement (FEIS) of Wood Point of May, 1977.

2. The Staff Report of September 21, 1977, is without merit and no new evidence is in the record to be in contradiction to the Staff Report of May 27, 1977. The Staff Report of September 21, 1977 was made contrary to due process of law.

3. The Staff Report is in error in alleging that the Total Proposal does not conform and is not within the intent and meaning of the following:

(a) Thurston County Shoreline Master Program, December, 1975;

(b) Comprehensive Plan and Subdivision Ordinance;

(c) Shoreline Management Act, and

(d) State Environmental Act.

4. The Staff Report is in error in citing the definition and classification for use of "Natural Environment" as a criteria and guideline for recommendation of denial of the Total Proposal to the Applicant. By using "Natural Environment" as a criteria and guideline for use of the property at Wood Point it is irrelevant, immaterial, with great prejudice and harm to the Applicant's rights and, contrary to the laws, policies and regulations already adopted, when Thurston County, pursuant to guidelines adopted by the State of Washington and Thurston County through public hearings has prior to application made and continues to designate and classify the project area as a "Rural Environment" recommending as first priority for use single family residences in an "Urban Environment".

5. The record does not support that the project area is or has "unique", "natural", or valuable resources that need preserving by denying the application of the Applicant and because of those features, not supported by the record, proposing the area already having been designated "Urban Environment" be changed to "Natural Environment" prohibiting all use of the property that otherwise would not contribute to the preservation of the property as "Natural Environment".

6. If the recommendation of the Staff is followed it is the opinion of the Applicant such action would be: (1) contrary to due process of law; (2) a denial to the Applicant of equal rights and privileges that other citizens have of the use of their property in the same designation and classification of "Urban Environment", and (3) a taking of property without due process of law by Thurston County without just compensation. Such action would therefore be in violation of those rights of the Applicant guaranteed to it in the Constitutions of the United States and of the State of Washington. A Memorandum is submitted in support of this issue.

II.

RESPONSE TO ISSUES

1. THE STAFF REPORT IS WITHOUT MERIT AND CONTRARY TO AND IN CONTRADICTION OF THE DEIS AND FEIS.

On April 11, 1977, the DEIS was registered. Response by public agencies expired by law on May 18, 1977. The response of all public agencies to the DEIS in the FEIS were favorable to the Total Proposal as then made and as set forth in the DEIS (24 lots, 75' buffer on shoreline and 50' on sides, common driveways, selective cutting of timber to preserve wild life habitat). The Total Proposal as now modified on September 8, 1977 further conforms to the response and development recommendations set forth in FEIS statement of the response of the Department of Game received April 1, 1977 by Richard L. Knight, (Appendix to Record, 113) in the following particulars:

(a) Place for housing units are clustered within the interior as reasonably feasible within the configuration of the property area.

(b) The shoreline buffer area is overall 75 feet and 50' on the south and west sides (except adjacent to lot 1) restricted to no building and minimum clearing for safety and view. Marsh areas are totally excluded from use or development. The areas of lots 2, 3 and 4 are to be left in natural state with no development for human activity. All major large trees are to be left standing. (See Exhibit II, Appendix to Record, surveying and locating 34 major trees to mostly be preserved.

NOTE: Page 36, Shoreline Master Program of Thurston County, for residential development in "Natural Environment" a 10 foot buffer strip only along the lake and a 100 foot set back from high water mark for residential buildings is required. In "Conversancy Environment" (pages 50 and 51) pathways must be provided, no buffer area required, and 100 foot building set back is required. In "Rural Environment" (pages 60 and 61) there is required pathways for upland lots to shoreline, no buffer required, houses and buildings must be set back 50' from high water mark.

(c) The recommendation of the State Game Department and the Department of Natural Resources is followed in the Total Proposal by having one public pier. (Appendix to Record 95 and 110).

The Staff Report ignores the lawful function of the DEIS and the FEIS and bases its conclusion contrary to such statements on the importance of public opinion in accordance with guidelines used when defining and classifying property not yet classified but in the process of being classified as "Natural Environment", as being a "unique", "natural" resource. Quite contrary- the FEIS was prepared by the Thurston County Planning Commission under the auspices of one qualified in the field to which the issue relates. (Dr. Eric Davidson, Associate Planner: Decrees: Bachelor: Biology; Masters: Botany; PHD: Biology). It absolutely makes contrary conclusions to the FEIS entitled: "Thurston County Planning Staff General Response to Comments Received on Draft EIS." Quotations are as follows:

> "Except for the fact that the site is adjacent to water and therefore would attract some fishing birds and mammals, this vegetation, habitat and wildlife is very common to western Washington." (Emphasis added)
>
> * * * * *
>
> "In general we consider the adverse impacts resulting from this project to be major relative to the site alone, but quite minor relative to the entire area of this habitat type" (Emphasis added)
>
> * * * * *
>
> "The unique value of this property as it now exists lies in its interface with the lake. The existence of the lake adds a dimension to the rather common habitat of second growth Douglas fir forest." (Emphasis added).

The Staff Report ignores the law as to the value of the response of public agencies charged with special expertise in making response to the DEIS by relying on public testimony as to "Natural Environment" when valued in the process of designating an environment, as opposed to ruling on a Total Proposal in an environment already designated. Certainly the Department of Natural Resources, the Department of Highways, Thurston-Mason District Health Center and the Thurston County Department of Public Works have such expertise which the Staff Report does not have and ignores. Under WAC 197-10-465 the Department of Natural Resources and the Department of Highways are mandated and: " . . . . . shall be regarded as possessing special expertise relating to those categories of the environment under which they are listed:. . ." In that law, among others, the Department of Natural Resources is listed in the category of expertise of "Natural Resources". The Staff Report is in complete contradiction to the response and recommendations of the Department of Natural Resources, (See Appendix to Record, 96 and 97 and FEID). As to traffic on Pleasant Beach Road, the Staff Report also ignores the memorandums of Thurston County Public Works, January 21, 1977 and February 24, 1977, (Appendix to Record, 83 and 84). The Staff Report makes issue that approval of the plat will make ingress and egress on Pleasant Beach Road "worse" for residents of the plat and those living off Pleasant Beach Road "during early fishing season emergencies". The congestion is already there; the Applicant fails to see why it should be denied use of a public highway and that its use or that of automobiles of 22 residential sites, not yet constructed, shall now, or in the future, be of any significant factor. For support is the statement of the Thurston County Public Works Memorandum of January 21, 1977 (Appendix to Record, 83) which states that: "the additional traffic on Pleasant Beach Road will be of no significant factor".

The Staff Report states the dock is larger than allowed by regulations. It ignores the existence already in "Urban Environment" of adjacent properties where there are 65 docks on the lake of which 17 are over 50 feet long ranging in length from 60 feet to 500 feet on state 2nd class shorelands without a legal right. The Report ignores that the Shoreline Master Program for Thurston County states a policy on page 30: "6. Communal shoreline works and structures are preferred to the proliferation of individual shoreline works and structures". It ignores the same recommendation of the Department of Natural Resources. (Appendix to Record, 95). It ignores that variance application permits such construction and was made by the Applicant on advise of the Staff that a variance could be granted.

2. STAFF REPORT OF SEPTEMBER 21, 1977 IS WITHOUT MERIT AND CONTRADICTS STAFF REPORT OF MAY 27, 1977, (MADE AFTER COMPLETION OF FEIS), WITHOUT NEW EVIDENCE.

The Staff Report of May 27, 1977 (after knowledge by public testimony, letters and FEIS) of "wintering" as well as "non-wintering" eagles in the area did not reject the project, approved a density of 21 sites, and because of the eagles preferred that the property was classified: "Conversancy Environment". (See Appendix to Record, 76, 77, 78). At the instance of a staff member without expertise in the field of wildlife, ecology, botany or biology, after a field trip by invitation and with Applicant personnel, where eagles were cited on July 1, 1977, obtained a letter from the Game Department after response to FEIS had legally expired and made a new Staff Report on July 7, 1977 (the same date for Public Hearing before Thurston County Planning Commission), making recommendation that the site was a

feeding site, and that seeing eagles in July means they are nesting and feeding in the vicinity of Lake Lawrence and therefore the application be denied and the property be re-classified to "Natural Environment".

It is the response of the Applicant that such report of July 7, 1977 upon which the Staff Report of September 21, 1977 is based was contrary to due process of law in that time for response from the Department of Game to the DEIS and FEIS had expired and that it was made by a member of the staff without new evidence and outside the record already made as to "non-wintering eagles" perching on the site.

3. TOTAL PROPOSAL MORE THAN CONFORMS WITH ALL LAWS, POLICIES AND REGULATIONS FOR USE OF 22 FAMILY SINGLE RESIDENCES.

Respectful attention of the Board of Commissioners is directed to the Proposed Findings of Fact and Conclusions, September 8, 1977 by Lake Lawrence, Inc.; the Appendix to Record, and specifically EXHIBIT 1 (pages 1 to 19, APPLICABLE LAW, POLICIES AND REGULATIONS) submitted in back of Appendix to Record by Lake Lawrence, Inc. on September 8, 1977).

4. STAFF REPORT IS IN ERROR USING "NATURAL ENVIRONMENT" AS CRITERIA AND GUIDELINE FOR DENYING OR ACCEPTING APPLICATION BASED UPON PUBLIC RESPONSE AND IGNORING DEIS, FEIS AND EXPERT TESTIMONY.

It may be admitted that when in the process of designating and classifying property to be in a certain environment that public response is favored. But that is not the case here and to admit so is highly prejudicial, immaterial and contrary

to law when the property has already with opportunity for public response been designated "Rural Environment". Rather the staff is required by the Shoreline Management Program of Thurston County in the "Rural Environment" to abide by one of the primary purposes of policy set forth on page 12 hereof: "NEW DEVELOPMENTS IN A RURAL ENVIRONMENT ARE TO REFLECT THE CHARACTER OF THE SURROUNDING AREA". When it was designated and classified "Rural Environment" several years ago, it is reasonable to conclude that in those several years no change of conditions has occurred or unique phenomena taken place to the property to now warrant that it be classified as unique or natural as "Natural Environment".

5. THE RECORD (FEIS, DEIS, TRANSCRIPTIONS OF TESTIMONY OF PUBLIC HEARINGS: APPENDIX TO RECORD, TRANSCRIPTION OF BOARD OF COMMISSIONERS HEARING SEPTEMBER 8, 1977) SUBSTANTIATES THAT THE PROJECT AREA HAS NO UNIQUE NATURAL FEATURES THAT ARE NOT COMMON TO MANY OTHER LANDS WITH SECOND GROWTH TIMBER FACING LAKES IN WESTERN WASHINGTON AND THE PROJECTED AREA IS ONLY UNIQUE TO SIMILAR PROPERTIES IN THE URBAN DESIGNATED ENVIRONMENT ON LAKE LAWRENCE BY THE PRESENCE OF A FEW LARGE DOUGLAS FIR TREES NEAR THE SHORELINE OF THE LAKE THAT EMERGE ABOVE THE SURROUNDING CANOPY OF LOWER TREES SURROUNDING THEM USED AS AN OCCATIONAL PERCHING SITE THROUGHOUT THE YEAR BY A FEW (LESS THAN 3 OBSERVED AT ANY ONE TIME) WINTERING BALD EAGLES NON NESTING IN THURSTON COUNTY AND FEEDING ON THE CARCASES OF DEAD SALMON THAT HAVE SPAWNED IN RIVERS AWAY FROM LAKE LAWRENCE AND NON-WINTERING, ADULT AND JUVENILE, NON-BREEDING AND NON-NESTING BALD EAGLES (LESS THAN 3 OBSERVED AT ANY ONE TIME). THE RECORD SUBSTANTIATES THAT THE FEEDING

IMPORTANCE ON DEAD LAKE TROUT AND WATERFOWL FROM THE PERCHING TREES IS NOT A PRIMARY FEEDING SITE AREA FOR THOSE EAGLES AND THE SITE IS NOT A CRITICAL SITE FOR THE PRESERVATION OF THE HABITAT OF EAGLES BUT HAS AN INSIGNIFICANT VALUE TO THE POPULATION OF EAGLES IN WESTERN WASHINGTON. THE LAST EAGLE'S NESTS OBSERVED ON LAKE LAWRENCE WERE IN 1940 AND THERE ARE NO NEW OR UNUSED NESTS NOW PRESENT IN THE LAKE VICINITY AREA OF LAKE LAWRENCE. THAT BECAUSE OF THE LEVEL OF HUMAN ACTIVITY ON THE LAKE AND UPLANDS OF THE LAKE AND THE RARITY OF BREEDING NESTS IN WESTERN WASHINGTON IT IS HIGHLY UNLIKELY THAT EAGLES SHALL NEST IN TREES NEAR THE SHORES OF LAKE LAWRENCE IN THE FUTURE. THE EAGLES NOW BEING OBSERVED PROBABLY HAVE A TOLERANCE OF HUMAN ACTIVITY AND THAT THE CONDITIONS FOR MITIGATION OF IMPACT ON WILD LIFE AND THE PRESERVATION OF PERCHING TREES FOR EAGLES SET FORTH IN THE TOTAL PROPOSAL OF THE APPLICANT CAN REASONABLY BE FULFILLED AND SUBSTANTIATE THE CONCLUSIONS MADE IN THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS (PAGE 39 et sequ.) TO THURSTON COUNTY BOARD OF COMMISSIONS, SUBMITTED BY THE APPLICANT ON SEPTEMBER 8, 1977).

The above statements are made by the Applicant from numerous references in the record that with the limited time for response citations to the record have been omitted.

The Staff Report of September 21, 1977, states the following that is in error:

> "The testimony so far presented and the record point directly to the value of this site as a wildlife habitat. Information

contained in the Final Environmental Impact Statement provides that the project site has several attributes which make it an especially valuable wildlife habitat.

1. Large trees and snags near the lake offer a clear view, providing feeding and roosting sites for bald eagles, red tailed hawks, owls and other large raptorial birds.
2. The relative solitude of the site contributes to its wildlife habitat value especially for bald eagles that do not tolerate extensive human activity.
3. Marshlands undeveloped to the south and east, adjacent to the property increase the value of the roosting and feeding trees on the project site.
4. The marshland and woodland on the site provide a habitat for a wide variety of wildlife."

Such statements are not supported by the record in the following particulars:

1. The large trees and snags on the site have only been observed to be used by bald eagles as an insignificant feeding and viewing site on the lake, for perching only and not roosting. No testimony has been offered of observations that those trees and snags have been or are being used by red tail hawks, owls or other large raptorial birds (other than bald eagles) and are therefore of significant value. Cited to support such statements are reference to the record as follows:

(a) Testimony of Dr. Felming: T-(14), lines 112, et seq.; T-(16) and (17), line 125 et seq.; T-(18), line 136.

(b) Testimony of Dr. Manuwal: Appendix to Record, 87; T-(26) and (27), line 217 et seq.

2. The site has little relative solitude for wildlife habitat and the bald eagles observed perching on trees of the site have been and probably will be more tolerant of human activity because of their age, the present level of human activity and observations made by the public in the past. Cited in support is the record as follows:

(a) Present level of human activity:

Hunting on site: See DEIS, page 7, last sentence; See Appendix to Record;
Size and number of docks, page 6;
Size and number of existing lots, page 7; see page 22 et seq. Section III, Proposed Findings, etc. September 8, 1977; Re: (2) supra.; see transcript, September 8, 1977;
Boat races and water skiing, T-(31), Mr. McDowell; Dr. Manuwal "Tolerance and age of eagles", T-(32); Testimony of Mr. Carpenter: T-(20), (21), (22);
Effect of human activity: Dr. Manuwal: T-(37), line 335 and Appendix to Record: Stalmaster page 126 et seq.

3. The marshlands undeveloped to the south and east, adjacent to the property do not increase the value of roosting and feeding trees on the project site. For there is no evidence in the record that the trees are used for "roosting" and importance of the site and lake for feeding is of minor significance to the eagles. Citations from the record have already been cited above as to distinction of "perching" v. "roosting" and "feeding" site.

4. The marshlands of the site are left undisturbed from development and are protected by a 75 foot buffer upland from their upland borders. The wildlife habitat of the marshlands indicate no nesting by birds that commonly would nest in those areas. The woodland is habitated by birds common to many stands of second growth timber.

Citations from record: DEIS "Wild Life Study, Exhibit V, FEIS: Thurston County Planning Staff General Response.

III.

CONCLUSION

LAKE LAWRENCE, INC. herefore respectfully urges the Board of Commissioners of Thurston County to unanimously adopt by resolution the Findings of Fact and Conclusions submitted to it by Lake Lawrence, Inc. on September 8, 1977. The Applicant is aware that the Total Proposal is objected to by some members of the public who are now enjoying the benefits of ownership and use of their property in the same designation and classification of "Urban Environment" for single family residence as is the Applicant's property. Therefore it may be detrimental politically for such a resolution to be made in behalf of the Applicant. However, the Applicant is confident that a fair, reasonable and lawful decision shall be made in it's behalf entitling it equally with others in the same classification, subject to the conditions imposed in its proposal, to the rights of use of its property in accordance

with the laws, policies and regulations already in effect to which the Total Proposal more than conforms.

Respectfully submitted,

s/_____
Lake Lawrence, Inc.,
By Philip P. Malone,
its Attorney

MEMORANDUM TO THE THURSTON COUNTY COMMISSIONERS

FROM: LAKE LAWRENCE, INC.

RE: WOOD POINT DEVELOPMENT

The applicant, Lake Lawrence, Inc., is providing this memorandum to the Thurston County Commissioners in order to advise the Board of the applicable law with regard to the Wood Point subdivision permit application. Admittedly the legal conclusions contained herein are presented in the light most favorable to Lake Lawrence, Inc., but the law in this area is clear and the applicant is sure the Board's staff counsel will concur.

This memorandum will not deal with the adequacy of any findings made by the County Commissioners. Rather, this brief is directed to the Planning Staff's Supplemental Staff Report and Recommendation that the application be denied, and the project area be redesignated as "Natural Environment".

Applicant's position will be presented in the following format. First, a brief statement of the essential facts. Second, the pertinent Federal and State constitutional provisions. Third, a short discussion of the applicable law. Finally, the relief Lake Lawrence, Inc., would be entitled to should the Board decide to adopt the Planning Staff's recommendations.

STATEMENT OF FACTS

The Shoreline Management Act of 1971, RCW 90.58.101 et seq., established guidelines for local governments to regulate future development of Washington's "wetlands". Based upon these guidelines Thurston County adopted its Shoreline Master Program, and designated the shorelands of Lake

Lawrence either "Rural Environment" or "Conversancy Environment". All of the Wood Point site was classified "Rural" and the other shore area on the lake similarly designated has been subdivided or platted as residential homesites.

Lake Lawrence, Inc., was aware of this designation, and understood that its proposed development would be acceptable subject to the laws, rules and regulations of Thurston County. In reliance upon the rural residential classification, the Applicant leased the Wood Point property from the State of Washington for a term of 55 years.

A "pre-submission conference" was held on September 8, 1976, between members of Lake Lawrence, Inc., and the County Planning Department. At this meeting the Applicant was notified that the project area was subject to residential development, and the development plan would be acceptable assuming it complied with the appropriate local ordinances. On January 12, 1977, the Applicant submitted it's application for plat permits. There has since ensued a series of hearings, environmental impact studies, public opposition to the project, proposals and counter proposals culminating with the Planning Staff's recommendations that the application be denied, and the area be redesignated "Natural Environment".

In reaching this conclusions [sic] the Planning Staff reasoned: (1) "because of a lack of information regarding the wildlife value of this site, it was incorrectly designated 'Rural'"; and (2) the "local citizen opinion highly values the resource and natural features of the site and is desirous of having it maintained as public lands and available to the public, not twenty-two private property owners". (Emphasis added). As a matter of law the Planning Staff's recommendations

are an unconstitutional re-designation of property, and an unconstitutional taking of private property for public use without compensation.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment:

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington State Constitution, Article I, Section Twelve:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Washington State Constitution, Ninth Amendment:

* * * (N)o private property shall be taken or damaged for public or private use without just compensation having been first made * * *.

APPLICABLE LAW

Lake Lawrence, Inc., contends that the proposed recommendations of the Planning Staff are

unconstitutional because: (1) reclassification of the subject property as "Natural Environment" is a taking of private property without just compensation; (2) Wood Point land must be treated like all other property designated and classified "Rural Environment", to do otherwise is a denial of the equal protection of the laws; (3) redesignating the Wood Point property "Natural Environment" constitutes spot zoning and is therefore unconstitutional; (4) once an application is made, or the property owner has relied upon existing regulations, the subject property cannot be redesignated to "Natural Environment"; and (5) as a matter of equity the Board is estopped from denying the application.

I.

RECLASSIFICATION OF APPLICANT'S PROPERTY AS NATURAL ENVIRONMENT IS A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND THE NINTH AMENDMENT OF THE WASHINGTON STATE CONSTITUTION.

The Shoreline Management Act of 1971 empowered local governments to zone or regulate future development of wetlands in accordance with State guidelines. The act was not intended to totally prohibit the use and development of such lands. To the contrary, the purpose of the law was to insure that the use of shorelands would be carefully carried out in the public interest. Dep't of Ecology v. Ballard Elks Lodge, 84 Wn. 2d. 551, 527 P.2d 1121 (1974).

Any such regulatory act necessarily raises two fundamental questions. First, the ownership of private property and the right to the use and enjoyment of it. Second, the authority of the government (subject to constitutional safeguards),

to regulate the use of private property in the public interest. At times these principles are in conflict, and the courts are called upon to resolve the resulting problem in human and legal relationships.

Although eminent domain and zoning are different concepts, it does not follow that zoning may be accomplished in all cases without just compensation to a landowner adversely affected by a land use regulation. It has been held in this respect that when a governmental entity determines that the public is served by classifying certain property at one level, and thereafter makes a determination that the public welfare now requires a lower level of classification which will drastically reduce the value of the affected property, the possibility arises of a duty to compensate the owner. 82 Am. Jur. 2d Zoning and Planning §6, page 391. Consequently, in reviewing any property regulations courts constantly emphasize the concepts of regulation under police power, and constitutional taking or damaging under the eminent domain power. The Board of County Commissioners sitting as a "quasi-judicial" body should do the same as the courts.

Where restrictions upon the ownership and use of private property do not unreasonably interfere with the rights of the owner, they are normally characterized as a valid exercise of the police power. State ex rel. York v. Board of County Commissioners, 28 Wn.2d 891, 184 P.2d 577 (1947). Nevertheless, it is also the law that a regulatory ordinance may not be used to take property for public use without payment or just compensation; for such action is repugnant to the constitutional guaranty that where private property is appropriated for public use, the owner shall receive reasonable compensation. Del., L. & R.R. v. Morristown, 276 U.S. 182 (1927).

Furthermore, the fact that a regulatory ordinance limits the use of and therefore depreciates the value of property may render it unconstitutional. Particularly where the limited use imposed on the land is unreasonable in terms of necessity, or the diminution in property value because of the use is tantamount to a confiscation. 82 Am. Jr. 2d Zoning and Planning §13, page 405. In other words, while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking. Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922). Thus wherever the operation and effect of any land use regulation extinguishes or destroys the property right of the owner, it is unconstitutional and void; and a law is considered as being a deprivation of property within the meaning of the Constitution if it deprives the owner of one of its essential attributes, destroys its value, restricts or interrupts its profitable use, or seriously impairs its value. 16 Am.Jur. 2d Constitutional Law §16, page 697; Inman v. Sandvig, 170 Wash. 112, 15 P.2d 696 (1932).

Justice Holmes capsulized the problem in the Pennyslvania Coal decision, supra at 416, when he noted:

> * * * The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. * * * [Citing cases.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

> * * * We are in danger of forgetting that a strong desire to improve the public condition is not enought [sic] to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. * * * (Emphasis added).

Redesignating Wood Point as a natural environment would substantially preclude the applicant from making any use of the property. Since the substantial value of property lies in its use, if the right of use is denied, the value of the property is destroyed and ownership is rendered a barren right. Ackerman v. Port of Seattle, 329 P.2d 210 (Washington 1958); See also, State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 P. 385 (1901); Great Northern Railway Co. v. State, 102 Wash. 348, 173 P. 40 (1918). Under these circumstances, the property in question must be condemned before it can be reclassified. Otherwise private property is being taken for public use in flagrant violation of both the United States and Washington Constitutions.

II.

THE WOOD POINT LAND MUST BE TREATED LIKE ALL OTHER PROPERTY DESIGNATED AND CLASSIFIED RURAL ENVIRONMENT, TO DO OTHERWISE IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS, AND CONSTITUTES SPECIAL LEGISLATION IN CONTRAVENTION OF ARTICLE I, SECTION TWELVE OF THE WASHINGTON STATE CONSTITUTION.

Courts, in considering the validity of any land use regulation, must determine whether such an ordinance is discriminatory in either its conception or application. 82 Am. Jur. 2d Zoning and Planning, § 14, page 407. Under the equal protection clause of the United States Constitution and Article I, Section 12 of the Washington Constitution, property use regulations must be uniform and

equal in operation and effect. That is -- they must contain reasonable classifications, and cannot be enacted upon the sole basis that certain individuals desire them. State ex rel. Smilanich v. McCollum, 62 Wn.2d 602, 384 P.2d 368 (1963). Obviously then, land use ordinances must not only be reasonable and nondiscriminatory, but they must also be applied in a nondiscriminatory and reasonable manner. 82 Am. Jur. 2d Zoning and Planning § 253, page 788; Matthews v. Fayette County, 233 Ga. 220, 210 S.E. 2d 758 (1974).

In the present situation Wood Point is being treated differently than all other similarly situated rural environment property on Lake Lawrence. Such discriminatory treatment is unreasonable and therefore a violation of both the United States and State Constitutions.

III.

REDESIGNATING THE WOOD POINT PROPERTY NATURAL ENVIRONMENT CONSTITUTES SPOT ZONING AND IS VIOLATIVE OF FEDERAL AND STATE CONSTITUTIONAL PROVISIONS.

Zoning ordinances are sometimes enacted whereby a small area is placed, or permitted to remain, in a more restrictive use classification than the surrounding property. This is known as "spot zoning", and in most instances such discriminatory ordiances have been held unconstitutional. 82 Am. Jur. 2d Zoning and Planning § 79, page 519.

In reviewing these redesignations courts may inquire as to whether these laws are unreasonable, oppressive or discriminatory. Kissinger v. City of Los Angeles, 327 P.2d 10 (California 1958). The Washington Supreme Court has gone so far as to say that spot zoning is arbitrary, capricious and unreasonable; and it is not only subject to review

but void ab initio. Pierce v. King County, 62 Wn.2d 324, 382 P.2d 628 (1963).

Applicant's property does not differ materially from any other portion of the Lake Lawrence shoreline currently classified as rural environment suitable for single family residences. Given these facts, an attempt to place the Wood Point land in a natural environment classification would be a clear violation of the constitutional prohibitions against spot zoning.

IV.

ONCE AN APPLICATION IS MADE, OR THE PROPERTY OWNER HAS RELIEF UPON EXISTING REGULATIONS, THE SUBJECT PROPERTY CANNOT BE REDESIGNATED TO NATURAL ENVIRONMENT.

Where a property owner, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, he acquired a vested right to complete his project in spite of subsequent changes in the land use ordinances. 82 Am. Jur. 2d Zoning and Planning § 168, page 672; State v. Pagels, 257 Wis. 376, 43 N.W. 2d 349 (1950). Likewise, where an application is made for a permit the applicant's rights are vested, and the governing body is required to issue the permit upon compliance with the existing use standards for the property involved. 82 Am. Jur. 2d Zoning and Planning § 167, page 670.

The Washington Supreme Court addressed this very same issue in State ex rel. Ogden v. Bellevue, 45 Wn.2d 495, 275 P.2d 889 (1954). Ogden's property was classified for business use and he applied for a permit to construct. The City of Bellevue attempted to deny the application by redesignating

the land agricultural. Ogden sued and the Supreme Court held that his rights vested when he applied for the permit, and the city was required to issue the permit upon compliance with the applicable law. In reaching its decision the Washington Court reasoned:

> "The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional." (Emphasis added)

In Vine v. Zabriske, 122 N.J.L. 4, 3 A.2d 886, 887 (1939), a property owner applied for a permit under existing use regulations, due to public opposition the ordinance was changed and the application denied. That Court, in no uncertain language, stated:

> "Clearly this was an eleventh-hour attempt to prevent this relator [sic] from using her property for its highest use and for which it had been zoned for seven years, during which time its assessed value had been substantially increased because it was so zoned. Such action was ill-advised, capricious and unreasonable. It was doubtless precipitated because of public excitement and clamor. Some of this opposition was

> likely based upon misinformation as to the plan of development contemplated.
>
> However, that may be, we are satsified [sic] that the result was an arbitrary interference with the lawful and legitimate use of private property." (Emphasis supplied)

Applicant concedes that Vine is a New Jersey case and not controlling as to Washington law. Nevertheless, the reasoning of the New Jersey Court is sound, and likely to be adopted by the Washington courts.

Perhaps the Wood Point property should have been designated natural environment, but this was not done. Instead, the land was classified rural and consequently subject to development. In reliance upon this classification Lake Lawrence, Inc. entered into a 55 year lease with the State and incurred additional costs in anticipation of the project. The permit application was filed while Wood Point was classified rural, and this designation cannot now be changed. In addition, upon compliance with the requirements applicable to such development of rural environments, approval of the plat becomes a ministerial act, and the permits must issue. 82 Am. Jr. 2d Zoning and Planning § 167, page 670.

V.

AS A MATTER OF EQUITY THE BOARD IS ESTOPPED FROM DENYING THE APPLICATION.

As a general rule a municipality does not have the authority to enact ordinances affecting property owned by the state. State Highway Commissioner v. Redford Township, 4 Mich. App. 223, 144 N.W.2d 690 (1966). But this is not the case with the Shoreline Management Act of 1971, for the statute

specifically provides that the State shall be subject to regulations promulgated under that law. RCW 90.58.280.

Municipal corporations are agencies of the state designed to assist in civil government and the regulation and administration of local affairs. Columbia Irr. Dist. v. Benton County, 149 Wash. 234, 270 P. 813 (1928). In short, municipalities stand in the shoes of the state.

Estoppel is defined as "an impediment or bar, by which a man is precluded from alleging, or denying, a fact, in consequence of his own previous act, allegation or denial to the contrary." 2 Jacob, Law Dictionary, 1811, 439. It is a doctrine of equity that arises where a party stands by and allows another to incur some liability toward him without informing the other of his mistake. Thus a person may not stand silent when he sees someone incur some obligation to him in reliance upon his silence.

In the present situation the State and County are part of the same governmental entity, and each one's action is binding upon the other. The State of Washington was aware that Lake Lawrence, Inc., intended to develop the Wood Point property when it signed the lease. Now the County, as an agency of the State, cannot as a matter of equity reclassify the subject land. To do so would be a manifest injustice, and the principles of equitable estoppel may be invoked against either a municipality or a state in such instances. State v. O'Connell, 83 Wn.2d 797, 523 P.2d 872 (1974); Shafer v. State, 83 Wn.2d 618, 521 P.2d 736 (1974).

CONCLUSION

For the foregoing reasons applicant respectfully submits that the Board should not adopt the

Planning Staff's recommendations. However, should the Board reach a contrary conclusion, Lake Lawrence, Inc., is prepared to seek either of the following remedies.

First, the applicant feels that the Planning Staff's recommendations could be enjoined as unreasonable, arbitrary and capricious, and a denial of the equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section Twelve of the State Constitution.

Second, such a denial of the application and reclassification is in effect a condemnation or taking of applicant's property without just compensation as provided for by the Fifth and Fourteenth Amendments of the United States Constitution, and the Ninth Amendment of the Washington Constitution. Lake Lawrence, Inc., could bring an inverse condemnation suit, and require the County to condemn the land. See Martin v. Port of Seattle, 64 Wn.2d 324, 391 P.2d 540 (1964).

It is well established that a tenant for years under a written lease is an owner of property and is entitled to be compensated when all or any part of the leased property is taken by condemnation proceedings. 27 Am. Jur. 2d Eminent Domain § 250, page 21. Moreover, it is generally acknowledged that in condemnation proceedings the property taken is to be valued at its highest and best use under existing zoning regulations. State v. Motor Freight Terminals, 57 Wn.2d 442, 357 P.2d 861 (1960). And the land cannot be rezoned to a lower use to depress its value. Kissinger v. City of Los Angeles, 327 P.2d 10 (Cal. 1958).

Applicant further submits that the highest and best use of the Wood Point acreage is as proposed in the application; single family residences. Hence, the applicant would be entitled to keep the property and sue for compensation for the loss of developmental use.

Respectfully submitted,

s/_____
Lake Lawrence, Inc.,
By Philip R. Malone,
its Attorney
Prepared by: Jesse Trentadue
Associate Counsel

APPENDIX A - RECORD
APPELLEE'S SEPTEMBER, 1977, FIRST DECISION

THURSTON COUNTY COMMISSIONERS

Olympia, WA 98501 September 30, 1977 206-753-8031

Mr. Art O'Neal
Thurston Regional Planning
Courthouse Annex
Olympia, WA 98501

Dear Mr. O'Neal:

At their meeting on September 28, 1977, the Board of County Commissioners passed a motion to deny the preliminary plat and shoreline permit for Woodpoint. The reasons for that decision are as follows:

1. There has been substantial evidence that this area provides a habitat for eagles.

2. The Comprehensive Plan for Thurston County, under Natural Resources Wildlife section, speaks to the actions that should be taken to preserve the natural resource of wildlife and it includes:

    1. "Cluster development should be encouraged so that the County can remain in its natural condition;
    2. Where development occurs, clustered buildings with open space designed for wildlife should be encouraged;
    3. And all projects should be evaluated for their impact on fish, fowl and mammals."

It further states "Rare and endangered animals in Thurston County are . . . significant or endangered birds are: western goshawk, eagles, osprey, hawks, valley quail . . ."

3. The Game Department's response to the Environmental Impact Statement, in part, was that in order to preserve the proposed site's value of the bald eagle habitat, a buffer strip of 200' or more would be required.

The Board also referred the matter of the designation of this property to you. Based on the findings of the decision made regarding this area, the Board would like your office to consider redesignation of this area.

Very truly yours,

C. WESLEY LEACH, County
Auditor and Ex Officio
Clerk of County
Commissioners

cc: Arden Olson - DNR by/s/Gerry Kunkel, Deputy

Appellee's First Decision

FILED:
10/27/1977

APPENDIX A - RECORD
SUPERIOR COURT, APPELLANT'S PETITIONS-
REVIEW AND PROHIBITIONS, NO. 58623, OCTOBER, 1977

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	NO. 58623 PETITION FOR WRITS OF REVIEW AND PROHIBITION

APPLICATION FOR WRIT OF REVIEW

COMES NOW the State of Washington, Department of Natural Resources and Lake Lawrence, Inc., through their respective attorneys, J. Lawrence Coniff, Jr., Assistant Attorney General and Philip P. Malone, and petition the above-captioned court for a Writ of Review directed to the Board of Thurston County Commissioners and above-named members of said Board in Case No. 225 (1532-34B-SH-TCO-1-77), entitled Lake Lawrence, Inc., Wood Point Preliminary Plat and Shoreline Permit Applications. (Writ of Review: RCW 7.16 et seq.; Plats: RCW 58.17.180). That said Writ of Review requires the

above-named respondents to certify to this Court at a specified time and place a full transcript of the record and proceedings had in said cause for review herein, and thereupon the Court review the same as to a claim by said Petitioners that the Board of Thurston County Commissioners' denial of preliminary plat and shoreline permits and recommended redesignation of subject property in this case was unlawful, arbitrary, capricious and violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Twelve and the Ninth Amendment to the Washington State Constitution, and also that the recommendation that Petitioners' Wood Point property be redesignated Natural Environment entered in said proceedings be stayed pending such review.

This petition is based upon the affidavit of J. Lawrence Coniff, Jr., Assistant Attorney General, and Philip P. Malone, hereto attached and by this reference made a part of this application. It is made known that the Petitioner, Lake Lawrence, Inc. is appealing the decision of the Thurston County Board of Commissioners as to denial of shoreline permits, to the Shorelines Hearing Board and subject to the decision of the Shorelines Hearing Board that if the decision is not in favor of the Petitioners, that it requests leave to amend the Petition for Writ of Review herein to review such decision.

APPLICATION FOR WRIT OF PROHIBITION

COMES NOW the above named Petitioners through their respective attorneys, and for their second claim for relief petition the above-captioned Court for a Writ of Prohibition addressed to Art O'Neal, directing said respondent not to redesignate the Lake Lawrence Wood Point property as Natural Environment.

This Petition is also based upon the affidavit of J. Lawrence Coniff, Jr., Assistant Attorney General and Philip P. Malone, hereto attached and by this reference made a part of this application.

s/
J. Lawrence Coniff, Jr.,
Assistant Attorney General
for the Department of
Natural Resources

s/
Philip P. Malone, Attorney
for Petitioner, Lake
Lawrence, Inc.

FILED:
10/27/1977

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners,	NO. 58623
vs.	AFFIDAVIT IN SUPPORT OF APPLICATION FOR WRITS OF REVIEW AND PROHIBITION
THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	

STATE OF WASHINGTON)
: ss.
COUNTY OF KITSAP)

J. LAWRENCE CONIFF, JR. and PHILIP P. MALONE, being first duly sworn on oath, depose and say:

I.

That Lake Lawrence is a small lake located in Thurston County, Washington. The second class tide lands of said lake are owned by the State of Washington and the State also owns a substantial portion of the uplands including a site known as WOOD POINT.

II.

That the Shoreline Management Act of 1971, RCW 90.58.101 et seq., empowers local governments to

regulate future development of shorelands in accordance with State guidelines. The State of Washington Department of Ecology Final Guidelines for said act establishes a framework of four categories of shoreline (extending 200 feet upland from the shoreline, plus marshlands). In order of increasing use permitted these categories are: NATURAL, CONSERVANCY, RURAL AND URBAN ENVIRONMENTS.

III.

That in December of 1975, the Thurston County Regional Planning Commission formulated the Shoreline Master Program For The Thurston Region. According to this program all the shorelands of Lake Lawrence were designated either Rural or Conservancy Environments.

IV.

That all of the Wood Point site was designated Rural Environment. All other shoreland designated Rural Environment has been subdivided or platted into residential homesites. In reliance upon this use designation Petitioner Lake Lawrence, Inc. leased the Wood Point property from the State of Washington for a term of 55 years, commencing September 1, 1976.

V.

That Petitioner Lake Lawrence, Inc. proposed to develop the Wood Point property into single family residences, and the Thurston County Planning Department notified Petitioner that said proposed development would be acceptable subject to the laws, rules and regulations of Thurston County.

VI.

That on January 12, 1977, Lake Lawrence, Inc. applied to the Board of Thurston County Commissioners for preliminary plat and shoreline permits to develop the 13.5 acre Wood Point site into twenty-seven residential homesites. Notice of the application was given and a public hearing set.

VII.

That Lake Lawrence residents did sign a petition to stop the proposed development. Oral testimony was taken at the aforementioned hearing from individual members of the public objecting to the project. Following the public hearing a staff report of the Thurston County Planning Commission was submitted containing no objections to the project by any state, county or local governmental agencies.

VIII.

That environmental impact statements were prepared and further hearing held. Lake Lawrence, Inc. voluntarily revised its application for preliminary plat downward to twenty-two single family residences in order to mitigate any possible or probable impact upon the environment. In these subsequent hearings testimony in opposition to the Wood Point project did not make known any new facts that had not been previously made part of the record.

IX.

That on September 21, 1977, the Thurston County Planning Department submitted a supplemental staff report and recommendation to the Board of County Commissioners. The Planning Department recommended that the Wood Point applications be

denied and the area redesignated NATURAL ENVIRONMENT. In reaching its conclusions the Planning Department reasoned: (1) that because of a lack of information regarding the wildlife value of the site, it had been incorrectly designated Rural Environment; and (2) that the local residents highly valued the resource and natural features of the site and desired having it maintained as public lands.

X.

That on September 28, 1977, the Board of Thurston County Commissioners, without sufficient evidence, contrary to procedure and due process of law and contrary to the Draft Environmental Impact Statement and Final Environmental Impact Statement and in denial of equal rights of the Petitioners for development of their land in the same environmental use classification: "Rural", single family residence, as other people in the same classification in the Lake Lawrence area, did adopt in full the aforesaid recommendations of the Thurston County Planning Department and thereby denied Petitioner Lake Lawrence, Inc.'s application for preliminary plat and shoreline permits, and recommended to the Director of Thurston County Regional Planning Commission that the Wood Point site be redesignated Natural Environment.

XI.

That Petitioners are interested parties in the aforementioned proceedings.

XII.

That Petitioners have no plain, speedy and adequate remedy in the ordinary course of law. Further, that the Thurston County Retional [sic] Planning Commissions' proposed redesignation of the subject property is without or in excess of its

jurisdiction, and the matter of redesignation of State leased property involves interests of the State of Washington at large as well as the health and welfare of the people of the State of Washington.

XIII.

That the Board of Thurston County Commissioners' denial of preliminary plat and shoreline permits to Lake Lawrence, Inc. was unlawful, arbitrary, capricious and violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Twelve and the Ninth Amendment to the Washington State Constitution.

XIV.

That this is a proper case for the issuance of Writs of Review and Prohibition pursuant to RCW 58.17.180, RCW 7.16.040 and RCW 7.16.290 et seq.

XV.

Wherefore, the Petitioners pray:

1. That a Writ of Review issue out of the above-captioned Court directing the Board of Thurston County Commissioners to certify its record in said proceedings to such Court, so that the reasonableness and lawfulness of its action therein may be inquired into and determined, or, in the alternative requiring said Respondents to show cause why such Writ should not issue.

2. That a Writ of Prohibition issue out of said Court directing Art O'Neal, Director of the Thurston County Regional Planning Commission to desist and refrain from redesignating the Wood

Point property to Natural Environment, or, in the alternative requiring said Respondent to show cause why such Writ should not issue.

3. For such other and further relief as this Court may deem just.

s/
J. Lawrence Coniff, Jr.,
Assistant Attorney General
for the Department of
Natural Resources

s/
Philip P. Malone, Attorney
for Petitioner Lake
Lawrence, Inc.

SUBSCRIBED AND SWORN to before me this 27 day of October, 1977.

s/
Doris Jane Snyder
Notary Public in and for
the State of Washington,
residing at Paulsbo.

FILED:
10/27/1977

APPENDIX A - RECORD
SUPERIOR COURT - SHOW CAUSE ORDER
OCTOBER, 1977, REVIEW AND PROHIBITION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	NO. 58623 ORDER TO SHOW CAUSE WHY A WRIT OF REVIEW SHOULD NOT ISSUE

THIS MATTER coming on for hearing this 27th day of October, 1977, upon motion of State of Washington, Department of Natural Resources and Lake Lawrence, Inc., supported by affidavit executed by J. Lawrence Coniff, Jr., Assistant Attorney General and Philip P. Malone, for a Writ of Review directed to George Barner, Jr., Del Pettit and Marj Yung, constituting the Board of Thurston County Commissioners, and Thurston County, requiring said Respondents to certify to this Court at a specified time and place a full transcript of the record and proceedings had in Case No. 225(1532-34B-SH-TCO-1-77), entitled Lake Lawrence, Inc., Wood Point Preliminary Plat and Shoreline Permit Applications, before said Board of County Commissioners,

and that thereupon this Court review the same as to the claim by said Petitioners that the denial of preliminary plat and shoreline permits and recommended redesignation of subject property in this case was unlawful, arbitrary, capricious and violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Twelve and the Ninth Amendment to the Washington State Constitution; and also that the recommendation that Petitioners' Wood Point property be redesignated Natural Environment entered in said proceedings be stayed pending such review. It further appearing to the Court that there may be sufficient grounds for such writ to issue, and the Court being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED that said members of the Board of Thurston County Commissioners appear before the Honorable Hewitt A. Henry, a Judge of the above-entitled Court, Room _____, Olympia, Washington, at the hour of 9:00 a.m. on the 14th day of November, 1977, and then and there show cause, if any they have, why the writ prayed for should not issue.

s/
Hewitt A. Henry, JUDGE

Presented by:

s/
J. Lawrence Coniff, Jr.,
Assistant Attorney General
for the State of Washington,
Department of Natural Resources and for Lake
Lawrence, Inc., whose
attorney is Philip P.
Malone, P.O. Box 443,
Poulsbo, Washington
98370

APPENDIX A - RECORD

SUPERIOR COURT, NOVEMBER 14, 1977, CLERK'S MINUTE ENTRIES, TRIAL SETTING, PROHIBITION AND REVIEW GRANTED, NO. 58623

MONDAY, NOVEMBER 14, 1977

CASE NO.	ATTORNEYS	TITLE OF ACTION	NATURE OF ACTION
7.58623	J. LAWRENCE CONIFF, JR., A.A.G. PHILIP P. MALONE ALEXANDER W. MACKIE	ST. OF WAN.[sic] DEPT. OF NATURAL RESOURCES v. THURSTON COUNTY, et al	TRIAL SETTING

SECONDARY APRIL 17-20, 1978 - 9:30 - Dept. 1

. . . .

MINUTES OF NOVEMBER 14, 1977
Continued

HONORABLE HEWITT A. HENRY
JUDGE PRESIDING
COURT CLERK: MARIANNE KENNEDY

. . . .

58623 WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, et al. v. THURSTON COUNTY, et al

This matter came on before the Court on a motion of Show Cause. J. Lawrence Coniff, Jr. AGG and Philip P. Malone were present for Petitioner; Alexander W. Mackie represented Thurston County. Court will grant the temporary writ of prohibition, also treated as a writ of certiorari, and will allow 30 days for filing of transcript.

FILED:
4/5/1978

APPENDIX A - RECORD
SUPERIOR COURT - APPELLEE'S APRIL 5, 1978
MOTION FOR OBTAINING COURT'S RECORD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	NO. 58623 MOTION TO RETURN THE RECORD ON CERTIORARI

THE BOARD OF THURSTON COUNTY COMMISSIONERS, by and through its undersigned Deputy Prosecuting Attorney, ALEXANDER W. MACKIE, hereby respectfully requests the Court to return the record in the above-captioned matter to the Board of County Commissioners to permit reconsideration of the Board's denial of the Plat of Wood Point.

On March 23, 1978, the Shorelines Hearings Board ruled in SHB 77-37 finding that the developer's proposal would not have a significant adverse effect on eagles and ruling that the proposal was, therefore, consistent with the Thurston County Shoreline Master Program. (See copy attached.) The Board of Thurston County

Commissioners has called a public hearing for April 18, 1978, at 3 p.m. to reconsider the case in view of the record and decision of the Shorelines Hearings Board. The Board of County Commissioners will consider the following alternatives:

(1) Whether to approve the plat and issue the shoreline substantial development permit in accordance with the decision of the Shorelines Hearings Board; or

(2) Whether to continue to deny the plat and appeal the decision of the Shorelines Hearings Board as clearly erroneous or contrary to law.

Any appeals from the action of the Board of County Commissioners or the decision of the Shorelines Hearings Board could be heard by this Court on the 5th, 6th, or 7th of July.

This request has been approved by Mr. J. Lawrence Coniff, Attorney for Petitioner, DEPARTMENT OF NATURAL RESOURCES.

Respectfully submitted,

PATRICK D. SUTHERLAND
PROSECUTING ATTORNEY

By: s/
Alexander W. Mackie
Deputy Prosecuting Attorney

FILED:
4/10/1978

APPENDIX A - RECORD
SUPERIOR COURT - APRIL 10, 1978, ORDER
RETURNING RECORD TO APPELLEES: APPELLEE'S
RECEIPT OF RECORD RECEIVED ON APRIL 10, 1978

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners,	)	NO. 58623
vs.	)	MOTION TO RETURN THE RECORD ON CERTIORARI
THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	)	

THIS MATTER having come before the Court upon petition of Respondents; Respondents represented by Alexander W. Mackie, Petitioner LAKE LAWRENCE, INC., represented by Philip Malone and and [sic] DEPARTMENT OF NATURAL RESOURCES, represented by J. Lawrence Coniff; and the Court having considered the request and comments of Counsel, finds that it is in the best interest of all parties to permit the Board of Thurston County Commissioners to reconsider their decision in the light of the decision of the Shorelines Hearings Board.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that the record in said matter be returned to the Board of Thurston County Commissioners for reconsideration and that any appeals in

this matter, either from the denial of the plat or the decision of the Shorelines Hearings Board be consolidated and heard by this Court on July 6 and 7, 1978.

DATED THIS 10 day of April, 1978.

s/
Frank E. Baker, JUDGE

PREPARED AND PRESENTED BY:

PATRICK D. SUTHERLAND
PROSECUTING ATTORNEY

By: s/
Alexander W. Mackie
Deputy Prosecuting Attorney

APPENDIX A - RECORD

SUPERIOR COURT - CLERK'S MINUTES APRIL 10, 1978

APPELLANT'S ATTORNEY ABSENT, APRIL 10, 1978-HEARING

58623 STATE OF WASHINGTON D.N.R. vs. THURSTON COUNTY ET AL

This matter came on before the court for hearing motion to return record on certiorari. Plaintiff represented by counsel Larry Coniff A.A.G. Defendant County through counsel Alexander W. Mackie. Lawrence Lake represented by counsel Philip Malone who was not present. The court being advised in the matter and reviewing the file signed order to return the record on certiorari and if counsel for Lawrence Lake Inc. is opposed to the order he may reopen.

FRANK E. BAKER
Dept. 2
Apr. 10, 1978

COMMISSIONERS SURVEY
LAKE LAWRENCE EAGLE HABITAT

The Daily Olympian
April 11, 1978

About 30 persons wanting to save the eagle roosting grounds at Lake Lawrence yesterday afternoon met with county commissioners to voice their opposition to a Shoreline Management Board decision that possibly could result in destruction of area trees.

Commissioners Marj Yung, George Barner and Del Pettit went to Lake Lawrence to survey the area where the Department of Natural Resources has agreed to lease 14 acres for a 22-lot subdivision. An eagle habitat lies in the area.

To protect the habitat, the commissioners had ruled a 200-foot setback from the lake would be needed before the preliminary plat was approved. But the Shorelines Management Board overturned the commissioners' decision by stating a 75-foot buffer zone and 50-foot shoreline setback would suffice.

The commissioners yesterday went to Lake Lawrence property to measure where the trees would be from the setback.

As it turned out, one of the eagle-roosting trees would either have to be chopped down, placed in the center of someone's house or be part of three lots set aside for public access.

Although commissioners refused to comment on a decision to appeal the Shoreline Management Board's finding, they all appeared highly concerned the shoreline board may have acted too hastily in overturning the 200-foot setback ruling.

"They (Shoreline Management Board members) cut it awfully tight," said Commissioner Pettit. "Our original decision was right."

Commissioner Barner not only was concerned about the eagle habitat, but was worried about other forms of wildlife near the eagles' roosting trees, especially a beaver lodge situated about 10 feet from shore.

Commissioner Yung refused to comment on her ideas about appealing the board's decision because of a court case involving the plat.

Most of those who met the commissioners at Lake Lawrence's public access area were in favor of preserving the habitat. A couple of persons there explained to commissioners they would help financew attorney fees to appeal the Shoreline Management Board decision.

In a general announcement, commissioners told the crowd the issue will be brought up in a commission meeting April 18.

APPENDIX - RECORD
Superior Court
Newspaper Article
Appellee's Site Investigation
4.10.80

FILED:
4/12/1978

APPENDIX A - RECORD
SUPERIOR COURT - APRIL 12, 1978
APPELLANT'S MOTION FOR RETURN OF RECORD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	)	NO. 58623 MOTION FOR RECONSIDERATION THAT ORDER REMANDING ACTION TO THURSTON COUNTY BOARD OF COUNTY COMMISSIONERS BE REVIEWED AND REVOKED

MOTION IS HEREBY made by PHILIP P. MALONE, attorney for Petitioner, Lake Lawrence, Inc., that the Court review its Order remanding this action to the Thurston County Board of Commissioners and revoke such Order on this matter heard on the petition for review as stated in the file on April 10, 1978.

This motion is made upon the affidavit of the Secretary of Philip P. Malone attached hereto and incorporated herein.

s/
Philip P. Malone
Attorney for Lake Lawrence, Inc.

STATE OF WASHINGTON)
: ss.
COUNTY OF KITSAP)

DORIS JANE SNYDER, being first duly sworn on oath, deposes and says:

1. That affiant is the Secretary for Philip P. Malone, attorney for Petitioners Lake Lawrence, Inc. herein;

2. That this affidavit was dictated to me by Philip P. Malone over the telephone while Mr. Malone is on vacation, this date;

3. That Respondent's Motion to Return the Record on Certiorari and copy of Order to Return the Record on Certiorari were received in this office on April 6, 1978;

4. That Notice of hearing on Motion to Return the Record on Certiorari was received in this office on Friday, April 7, 1978;

5. That Philip P. Malone did not have an opportunity to be heard and he is being denied judicial process of the Court having remanded this matter to Thurston County Board of Commissioners without adequate notice to Philip P. Malone of the hearing thereon, and further that there is before the Court on April 17, 1978 through April 20, 1978, a decision of whether the Thurston County Commissioner's action is either arbitrary, capricious or erroneous, to substantiate findings and conclusions to be made by the Court and to have remand by Order of the Court after such evidence and review to the Thurston County Board of Commissioners in accordance with its findings and conclusions.

DATED THIS 11th day of April, 1978.

s/
Doris Jane Snyder

SUBSCRIBED AND SWORN to before me this 11th day of April, 1978.

s/
Notary Public in and for the State of Washington, residing at Poulsbo

APPENDIX A - RECORD
SUPERIOR COURT, APRIL 17, 1978, CLERK'S MINUTES, COURT'S ORDER, APPELLEE'S RETURN RECORD - BY APRIL 27, 1978

58623 STATE OF WASHINGTON vs. THURSTON COUNTY ET AL

This matter came on before the court for hearing motion for reconsideration that order remanding action to Thurston County Board of Commissioners be reviewed and revoked. Plaintiff counsel Mr. Coniff appearing not; Defendant counsel Philip Malone and Alexander Mackie present. Mr. Malone moving on the above motion. The court hearing from counsel ordered and grant to send back to the commissioners and to be decided within 10 days from this date then to be renoted back to the court for hearing.

FRANK E. BAKER
Dept. 2
April 17, 1978

FILED:
4/7/1978

APPENDIX A - RECORD
SUPERIOR COURT - APPELLANT'S
APRIL 7, 1978 - NOTICE OF TRIAL AMENDMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington Corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEAL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, Respondents.	NO. 58623 NOTICE OF TRIAL AMENDMENT

TO: THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT and MARJ YUNG, Constituting the BOARD OF THURSTON COUNTY COMMISSIONERS, and ART O'NEIL, DIRECTOR OF THE THURSTON COUNTY REGIONAL PLANNING COMMISSION, c/o Alexander W. Mackie, Deputy Prosecuting Attorney, 310 Thurston County Courthouse, Olympia, Washington 98501, attorney for Respondents;

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, c/o Lawrence Coniff, Jr., Assistant Attorney General, Department of Natural Resources, Public Lands Building, Olympia, Washington 98504, attorney for co-Petitioners:

FROM: LAKE LAWRENCE, INC., by its attorney, PHILIP P. MALONE:

YOU ARE HEREBY NOTIFIED that at the time of trial on this matter set for April 17, 1978 through April 20, 1978, there shall be presented for record and review of the Court the following, attached hereto:

1. Final Findings of Fact, Conclusions of Law and Order.

2. Testimony of:

(a) Petitioners:

1. Robert Anderson;
2. Dr. Richard Fleming

(b) Respondents:

1. Eric Knight
2. Mr. Carpenter

It is noted that there were no other witnesses of record other than the testimony of James Howton and due to expense, will not be presented on trial amendment.

Further will be presented at time of trial amendment all exhibits presented to the Shorelines Management Board, copy attached.

DATED this 4th day of April, 1978.

s/
Philip P. Malone, Attorney
for Lake Lawrence, Inc.

FILED:
4/7/1978

APPENDIX A - RECORD
SUPERIOR COURT, APRIL 7, 1978 - SHORELINES BOARD, FINDINGS, CONCLUSIONS & ORDER OF 3/23/78

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT DENIED BY THURSTON COUNTY TO LAKE LAWRENCE, INC.	)	
	)	SHB No. 77-37
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC.,	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Appellants,	)	
v.	)	
THURSTON COUNTY,	)	
Respondent.	)	

This matter, the appeal of the denial of an application for a shoreline substantial development permit, came before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Robert E. Beaty, Robert F. Hintz, and Chris Smith on February 14, 15, 16 and 17, 1978 in Lacey. Board member Robert F. Hintz, being unable to attend the hearing on February 17, has read the transcript for that day.

Appellant Lake Lawrence, Inc. appeared through its attorney, Philip P. Malone; appellant, State Department of Natural Resources (hereinafter "DNR") appeared through J. Lawrence Coniff, Jr., Assistant Attorney General; respondent Thurston County, was

represented by Alexander W. Mackie, Deputy Prosecuting Attorney. David Akana presided.

Appellant DNR brought a motion to remand the matter to respondent to reconsider the decision and to render a "final decision" in accordance with the requirements of the State Administrative Procedures Act ("APA"), chapter 34.04 RCW. Appellant Lake Lawrence, Inc. joined in the motion. We conclude that the motions should be denied. The APA applies only to "state" agencies. See League of Women Voters v. King County, SHB No. 13; Brachvogel vl Mason County, SHB Nos. 45, 140, 189. Administration of the Shoreline Management Act is vested in local government. RCW 90.58.050. Compliance with "state" policy is insured by the supportive and review capacity of the State Department of Ecology. Id. Appellants also argue that the County's decision was simply an unreasoned statement, whereas a reasoned final order was required. It may be that findings of fact and conclusions or reasons will be required for permit proceedings in the future. See Parkridge v. Seattle, 89 Wn.2d 454 (1978). But such requirement is not retroactively required in the instant matter. In any event, appellants could have conducted discovery or brought an appropriate motion, which they have not done. WAC 461-08-010. And since this Board reviews each appeal de novo, appellants are not materially prejudiced. The motion is therefore denied.

Respondent moved that the appeals be dismissed on the ground that the denial of the proposed plat by the County on grounds under chapter 58.17 RCW renders "moot" the request for the substantial development permit to implement the plat. The motion should be denied. While the County may have concerns for the proposed plats under chapter 58.17 RCW, it remains that a shoreline substantial development permit was denied on a particular

proposal. This Board can review such denial within the context of the Shoreline Management Act. RCW 90.58.180(1). Other requirements and approvals for the proposal must nonetheless be met before the proposal can proceed. RCW 90.58.360. The motion is therefore denied.

Counsel made opening statements; the Board viewed the site; witnesses were sworn and testified.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

Lake Lawrence is a small (approximately 339 acres in area), relatively shallow (up to 30 feet deep) lake located south of the town of Yelm in Thurston County. The State of Washington, Department of Natural Resources owns slightly over 14 acres of a shoreline area on Lake Lawrence known as Wood Point (hereinafter referred to as the "site"). DNR also owns an offshore island, the bed of the lake and the property immediately west of the site, on which the Department of Game has a public boat ramp.

II

The site is presently covered with second-growth timber and dense vegetation. Some larger "emergent" trees, scattered over the property, rise above the "canopy" formed by the smaller trees. The underbrush along the shoreline provides good cover and habitat for small animals and birds.

III

In August of 1976, the State Department of Ecology approved the shoreline master program for the Thurston County region. Therein, all of the shorelands of Lake Lawrence were designated in either rural or conservancy environments.[1]

---

[1] The Shoreline Master Program (pp. 11, 12) for the Thurston Region describes the environments as follows:

. . .

2. Conservancy Environment

. . .

Definition: The "Conservancy Environment" designates shoreline areas for the protection, conservation, and management of existing valuable natural resources and historic and cultural areas. This environment is characterized by low-intensity land use and moderate-intensity water use with moderate to little visual evidence of permanent structures and occupancy. Sustained management of the pastoral, aquatic and forest resources, as well as rigidly controlled utilization of nonrenewable and other nonmineral resources which do not result in long-term irreversible impacts on the natural character of the environment are permitted. Intensity of recreation and public access may be limited by the capacity of the environment for sustained recreational use.

3. Rural Environment

. . .

Definition: The "Rural Environment" designates shoreline areas in

All of the instant site was designated "rural" in the shoreline master program. Shorelands lying west of the site have been designated as rural; shorelands lying east of the site have been designated conservancy. Much of the lake shore is platted for residential development.

IV

Lake Lawrence, Inc., an appellant herein, proposes to develop the site into single-family residences. In reliance upon the rural use designation, Lake Lawrence, Inc. leased the site from DNR for a term of fifty-five years beginning on September 1, 1976. By separate agreement, it also leased from DNR certain second class shorelands adjacent to the uplands.

(Footnote Continued)

> which land will be protected from high-density urban expansion and may function as a buffer between urban areas and the shorelines proper. This environment is characterized by low intensive land use and moderate to intensive water use. Residential development does not exceed two dwellings per acre. Visual impact is variable with a moderate portion of the environment dominated by structures or impermeable surfaces. Intensive cultivation and development of the renewable soils, aquatic and forest resources, as well as limited utilization of nonrenewable mineral resources is permitted. Recreational activities and public access to the shoreline are encouraged to the extent compatible with other rural uses and activities designated for this environment.

V

On January 12, 1977, Lake Lawrence, Inc. applied to the Board of Thurston County Commissioners for a preliminary plat and shoreline permit to develop the site into twenty-seven residential home sites. The proposal was amended several times subsequently. A draft environmental impact statement (EIS) was prepared, public hearings were held, comments received, and a final EIS was completed and filed with the Thurston County Planning Department in May of 1977. The planning department recommended approval of the revised proposal.

After the May 27, 1977 staff report to the Land Use Committee and a Land Use Committee meeting by the Planning Commission, a site visit was arranged for all parties. The visit was held on July 1, 1977 and three eagles were observed on the site consisting of two adults and an eaglet. After the trip and discussions with the State Department of Game, the Thurston County Planning staff changed its report and recommended that the development proposal be denied. The staff also recommended that the shoreline designation be reconsidered.

On July 13, 1977, the Thurston County Planning Commission met to consider the applicant's revised proposal and the staff recommendations. The Planning Commission lacked a quorum to render a decision and forwarded the proposal to the Board of County Commissioners with no recommendation.

The Board of County Commissioners held two public hearings on the proposal, on August 17, 1977 and September 8, 1977. On September 8, 1977, the applicant submitted a proposal revising the buffer zone along the shoreline for additional protection of wildlife habitat. The revisions were made in response to environmental concerns disclosed in the EIS and particularly as to the trees which had been

identified as an "eagle habitat" on the site. After the public hearing, the Board of County Commissioners called for additional written comments from the developer, the public and staff and on September 28, 1977, denied both the application for preliminary plat and shoreline permit. That decision was memorialized by a letter dated September 230, 1977 addressed to the Director of the Thurston County Planning Department, signed by the ex officio clerk of the County Commissioners. The decision, which did not include consideration of the request for a conditional use and/or variance permit for a community dock, was appealed to this Board.

VI

The proposed substantial development in its last configuration consists of creating 15 "waterfront" lots and ten upland lots. (See exhibit A-8). Three of the waterfront lots will be set aside for an "eagle preserve." A 1,000-foot long private road with a 60-foot wide right of way separates the upland and the waterfront lots. Each lot would be served by an individual septic system. Other features of the project include common driveways to adjacent pairs of lots, utility lines along boundary lines and to the community dock, common areas for picnic and walking areas and a water well, fence protection along the southern boundary, and an 88-foot long private community pier with eight 24-foot long fingers located on second class shorelands. Drainage and pedestrain [sic] access from the development is provided through the shoreland towards the lake. The development is nearly surrounded by a greenbelt area which is 75-feet wide at the shoreline and 50-feet wide at other boundaries except adjacent to the existing public boat ramp located on the western boundary. Additionally, there would be a 50-foot building set back from the 75-foot shoreline buffer.

Protective covenants and restrictions are intended which would control the removal of trees and preserve the greenbelt buffer and marsh areas. Hunting would be prohibited. Certain other covenants and restrictions are required by the DNR lease.

Lake Lawrence, Inc.'s upland lease with DNR provides for no residental [sic] construction in the buffer zone, requires written consent prior to removal of trees in the greenbelt buffer area, restricts clearance of vegetation and fallen trees therein except for a walking path or for encouragement of natural growth of trees and vegetation and permits the construction of fences and gates along the inland west and south perimeter boundaries. The lease permits clearing of vegetation and placement of picnic tables, benches, water and sanitary facilities and outdoor cooking facilities in either the west or south buffer area for the recreational use of lot owners.

VII

Bald eagles have long been observed both in undisturbed wooded areas and on trees near residential structures at Lake Lawrence. Sightings have occurred during winter and summer months, and even during portions of the year when human activities extend to the lake for fishing and recreational purposes.

At the instant site, bald eagles have been observed perched on several preferred "emergent" trees. It is unlikely that bald eagles have used the site for nesting. It is likely that bald eagles use certain trees near the water on the site for perching while feeding at the lake. However, the lake is not a primary or critical feeding area. Such feeding areas are more likely found at the nearby Deschutes River and Nisqually River where

spawning salmon can be found. At Lake Lawrence, eagle food sources include fish, which is stocked by the Department of Game, and waterfowl.

VIII

There are two types of bald eagles. One type, the southern bald eagle, is found south of the 40th parallel, and has been declared to be an "endangered species." Such designation indicates that a species' population is small or declining, or that their habitats are being destroyed. The second type, the northern bald eagle, is found north of the 40th parallel, and has recently been placed in "threatened" status, which means threatened with "endangerment."

IX

The critical aspects of eagle habitat include nesting, winter roosting and feeding areas. Although Lake Lawrence is not a primary feeding area, it is nonetheless an "incidental" perching area for eagles. Preservation of favored perching trees together with an adequate surrounding buffer would be a proper requirement for the instant development. Visual screening from ground activities is an important part of such a buffer. Noise from normal human residential activities are not ordinarily disturbing to some eagles. Human activities on the water disturb the eagles the most. According to the scientific evidence, including exhibits (R-1; R-4) and expert testimony, the setting aside of three waterfront lots (lots 3, 4, and 5) and buffer area in the shoreline for an "eagle preserve" provides adequate protection against significant adverse effect to the eagles in this proposal.

X

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

CONCLUSIONS OF LAW

I

The denial of appellant Lake Lawrence, Inc.'s application is reviewed, after the adoption and approval of the applicable master program, for consistency with the master program and the provisions of the Shoreline Management Act. RCW 90.58.140(2)(b).

II

This Board reviews de novo the action of the County. E.g. Brachvogel, et al. v. Mason County, SHB No. 140. The burden of proving consistency with the Shoreline Management Act and the master program herein is upon the appealing party. RCW 90.58.149(7). E.G. Wallingford Community Council, et al. v. City of Seattle, SHB No. 203.

III

The proposed substantial development (without the community dock) is consistent with the master program environment regulations for the rural designation.[2]

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2 The Rural Environment Regulations of the master program (pp. 60 and 61) require developers to indicate how shoreline vegetation and erosion will be controlled during construction. (See also paragraph six of the master program, p. 28.) In this matter a vegetation and tree buffer will

The proposed substantial development (without the community dock) is consistent with the master program policies for regulation of use activities for residential development provided that preservation of the remaining vegetation along the waterfront in the natural buffer is made a condition of a shoreline permit.

IV

The proposed substantial development (without the community dock) is consistent with the general policy of the master program and the provisions of chapter 90.58 RCW.

V

The propriety of the proposed community dock is not here addressed inasmuch as the conditional use or variance permit required is not now before this Board.

VI

A permit for the project, as described herein and when conditioned as provided for in Conclusion

(Footnote Continued)

remain along the shoreline. The regulations require access and pathways upland from the ordinary high water mark to be held for common use by residents of the development. the instant development provides for such. Residential density limitations of two dwelling units per acre (28 maximum allowed herein) are met by the proposed development. (See also paragraphs eight and nine of the master program, p. 28.) The 125 foot total setback (75 feet of which is in common use) from the lake exceeds the 50-foot requirement of the master program. (See also paragraphs two, three and four of the master program, p. 27.)

of Law III, will be consistent with the master program of Thurston County and the provisions of the Shoreline Management Act.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters the following

ORDER

The denial of a shoreline substantial development permit is reversed and the matter is remanded to Thurston County for further proceedings.

DATED this 23rd day of March, 1978.

SHORELINES HEARINGS BOARD

s/
DAVID J. MOONEY, Chairman

s/
ROBERT E. BEATY, Member

s/
ROBERT F. HINTZ, Member

s/
CHRIS SMITH, Member

FILED:
5/31/1978

APPENDIX A - RECORD
SUPERIOR COURT-5/30/78, APPELLEE'S SECOND DECISION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DNR, ET AL. Petitioners, v. THURSTON COUNTY, ET AL. Respondents.	)	No. 5 8 6 2 3 AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

Vivian Trotland, being first duly sworn, upon oath deposes and says: That she is a secretary in the Office of the Prosecuting Attorney, over the age of eighteen (18) years and competent to be a witness in the above-entitled cause; that heretofore and on the 31st day of May, 1978, your affiant caused to be mailed copies of the Clerk's Affidavit of Thurston County Record for Review Under Amended Writ of Certiorari and Findings of Fact and Conclusions of Law address as follows:

Mr. Philip P. Malone
Attorney at Law
153 First Street
P.O. Box 443
Poulsbo, WA 98370

Mr. J. Lawrence Coniff
Assistant Attorney General
Temple of Justice
Olympia, WA 98504

Mr. Thomas Brucker
1411 Fourth Ave. Bldg.
#610
Seattle, WA 98101

and deposited same in the United States mail at Olympia, Washington.

s_____

SUBSCRIBED AND SWORN TO before me this 31 day of May, 1978.

s/_____
Notary Public in and for
the State of Washington,
residing at Olympia

FILED:
5/31/1978

APPENDIX A - RECORD
SUPERIOR COURT-5/30/78, APPELLEE'S SECOND DECISION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., A Washington Corporation,	)	No. 5 8 6 2 3
Petitioners,	)	PRELIMINARY PLAT WOOD POINT
v.	)	FINDINGS OF FACT AND CONCLUSIONS
THURSTON COUNTY, et al.,	)	OF LAW
Respondents.	)	

THIS MATTER came before the Board of Thurston County Commissioners April 18, 1978, for public hearing on remand from the Shorelines Hearings Board and the Thurston County Superior Court with direction from the Superior Court to make a decision within ten days of the hearing on remand.

The Applicant, Lake Lawrence, Inc., was represented by PHILIP P. MALONE; the Owner, Department of Natural Resources, was represented by J. LAWRENCE CONIFF.

On April 24, 1978, after considering the application, the environmental impact statement, the record on remand, the comments and testimony at the public hearing, anbd the briefs and arguments of counsel, the Board discussed the alternatives in the case and voted unanimously to deny the preliminary plat of Wood Point. The Board further determined that the denial of the preliminary plat

rendered moot the question of a shoreline substantial development permit and, therefore, elected not to appeal the decision of the Shorelines Hearings Board in SHB 77-37. The findings of fact and conclusions of law in support of the Board's decision are attached.

Respectfully submitted,

s/
MARJ YUNG, Chairman
Board of Thurston County
Commmissioners

APPENDIX A - RECORD
SUPERIOR COURT-5/30/78, APPELLEE'S SECOND DECISION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., A Washington Corporation, Petitioners,	)	No. 5 8 6 2 3
v.	)	
THURSTON COUNTY, et al., Respondents.	)	

FINDINGS OF FACT

I. Definitions

A. The Board - The Board of Thurston County Commissioners

B. The Applicant - Lake Lawrence, Inc.

C. The Owner - Department of Natural Resources

D. The Staff - Thurston County Planning Department

E. The Record -

BOOK I BOARD OF THURSTON COUNTY COMMISSIONERS FIRST HEARING, AUGUST 17, 1977

ITEM 1. APPLICATION: PLANNING DEPARTMENT TRANSMITTAL CONCERNING CASE #225 and CASE SH-TCO 1-77

ITEM 2. CORRESPONDENCE PERTAINING TO AUGUST 17, 1977, PUBLIC HEARING

ITEM 3. TRANSCRIPT OF AUGUST 17, 1977, HEARING

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ITEM 1. FINAL DECISION

ITEM 2. TRANSCRIPTS FROM:
MR. ROBERT J. ANDERSON
MR. RICHARD S. FLEMING
MR. RICHARD L. KNIGHT

BOOK VI SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. TRANSCRIPTS FROM:
MR. CHARLES E. CARPENTER
MR. STEVEN PHILLABAUM
MR. GEORGE PALLIS

BOOK VII SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. STIPULATED EXHIBITS

BOOK VIII SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. THURSTON COUNTY COMPREHENSIVE PLAN

BOOK IX SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. SHORELINE MASTER PROGRAM FOR THE THURSTON REGION

BOOK X SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. APPELLANT'S EXHIBITS A-1 THROUGH A-13

BOOK XI SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. RESPONDENT'S EXHIBIT R-1

BOOK XII SUPPLEMENTAL RECORD FROM SHORELINES HEARINGS BOARD

ITEM 1. RESPONDENT'S EXHIBITS R-2 THROUGH R-5

BOOK XIII BOARD OF THURSTON COUNTY COMMISSIONERS HEARING ON REMAND

ITEM 1. TRANSCRIPT OF APRIL 18, 1978, HEARING OF THE BOARD OF THURSTON COUNTY COMMISSIONERS ON REMAND

ITEM 2. TRANSCRIPT OF APRIL 24, 1978, MEETING OF THE BOARD OF THURSTON COUNTY COMMISSIONERS FINAL DECISION OF THE BOARD OF THURSTON COUNTY COMMISSIONERS

ITEM 3. CORRESPONDENCE AND MEMORANDA FROM APRIL 18, 1978, HEARING AND APRIL 24, 1978, CONTINUATION

F. Final Decision

The decision of the Board issued April 24, 1978, stating that the preliminary plat of Wood Point should be denied for the following reasons:

1. In a policy statement in the Comprehensive Plan the County has identified eagles as a rare and endangered species; that substantial testimony exists to show that eagles have long used Lake Lawrence and the Wood Point site for feeding and perching. Testimony relating to eagles' use of this site is substantially more testimony than any other site considered by the Board for development. Therefore, a finding is made that the public interest is best served by assuring the continued use and availability of the Wood Point site for perching and feeding by eagles.

2. All who have testified agree that residential development will have some effect on the eagles' use of the site and that eagles are disturbed by human activities. Substantial testimony was entered to the effect that the developer's proposal provided adequate protection against significant adverse effect to the eagles. However, the same experts indicate that eagle tolerance to human activity apparently varies based upon age, activity, number of eagles, and nature of disturbance. Residential development will necessarily require clearing for roads, driveways, drainage, sanitary facilities and water, homes and yards. Construction disruption of a temporary nature will exist. Following construction, the area will have daytime human activity and nighttime residents, presumably during all seasons, with artificial illumination. What is apparent from the record is how very

little is known about eagles feeding and perching in the lakes in the State of Washington. And with respect to residential subdivisions, how much human activity is tolerated before the eagles leave the area, and finally what the cumulative effect is. That finding is that we simply do not have as much information as we would need.

3. Substantial testimony indicates that at Lake Lawrence, the eagles fly from the developed areas to this site and other undeveloped areas when disturbed.

4. Much has been made that the Lake Lawrence, Inc., group has a vested right to develop the property as Lessee from the Department of Natural Resources. The Department of Natural Resources advised us that their criteria for the decision was economic, to make money for the University of Washington Trust and that the property was not suitable for economic forest management. The decision to lease the property was without an EIS and apparently with no knowledge that eagles used the site or any consideration of the value of the property given its more than occasional use by eagles. Under the State Environmental Protection Act the Board is required to consider the alternatives to a project, including the alternative of no development. SEPA requires a balancing of interests in this case between the continued use of the site by eagles and the development of the site for residential recreational purposes. Given the

protected status of the eagles under the Comprehensive Plan and the acknowledged effect of residential development, the balance must be to assuring the continued use by eagles. I find the assurance lacking and find the public interest would be best served by no development of this site until more is known about the importance of inland lakes on non-nesting eagles during both summer and winter.

5. By permitting the development and taking the risk of an irretrievable loss in an area regularly used by eagles, the public interest would not be served. See Transcript Volume XIII, Pages 13-15, 18, 19.

II. The Proposal

A. The proposal before the Board is for preliminary plat approval for the development of 22 single-family lots on approximately 14 acres of land located on Lake Lawrence in Thurston County, Washington. The proposal is detailed on the amended application as modified by Exhibit A 8. (Volume X, Item 1 A 8)

B. Permits required from Thurston County for the proposal are:

1. Preliminary plat approval, Chapter 58.17 RCW; Title 18 Thurston County Code.

2. Shoreline substantial development permit for the development together with a variance or conditional use permit for a private dock exceeding maximum length and width permitted on

rural lakes, all under Chapter 90.58 RCW and the Thurston County Shoreline Master Program approved August, 1976.

III. The Modified Proposal

A. 1. The Board requested staff to indicate the modifications and conditions they would recommend to the plat to implement the findings and recommendations of the Shorelines Hearings Board.

2. The Board of County Commissioners finds that the modified plat as described in staff letter dated April 24, 1978, together with attachments, (Volume XIII, Item 3) is consistent with the decision of the Shorelines Hearings Board and is the plat which offers the maximum protection to the continued use of the site by eagles given the developer's desire to retain 22 single-family detached residential dwelling sites at this development.

3. The Board finds that disturbance between the eagle and the water is the most disruptive direction for disturbance to the perching eagles and that the presence of the dock proposed by the applicant is an unreasonable interference with the continued use of the site by eagles.

4. The Board finds that the dock proposed by the applicant substantially exceeds the docks permitted on rural shorelines

in Thurston County under the Thurston County Master Program. The Board finds adequate boat access exists through the Game Department boat ramp adjoining the plat; and that the dock as proposed is contrary to the policies of the Shoreline Master Program and the Shoreline Management Act; and further, that appellant has failed to satisfy the conditions of the Shoreline Master Program and the Washington Administrative Code for a variance or conditional use.

III.A. The Property

A. The Board acknowledges that Lake Lawrence, Inc. has a lease on said property and leased said land from the Department of Natural Resources without apparent knowledge that eagles used the site. The Board also recognizes that many, in fact most, developments are originally proposed without full knowledge of the facts and further that many subdivisions are not developed as originally proposed.

B. The Board finds the fact that this subdivision has a public owner (Department of Natural Resources) does not give it a special license to develop as the State wishes without regard to public interest.

IV. The Preliminary Plat

A. The Board finds the modified proposal is consistent with all specific regulations

for preliminary plat development under Chapter 58.17 RCW and Title 18, Thurston County Code, including open space, drainage ways, streets, public ways, water supplies and sanitary sewers; and further finds that additional provisions in this plat for playgrounds, school sites or parks are not required.

B. The Board finds that the public interest in Thurston County is to assure protection of natural habitats which are actively used by eagles for feeding and perching.

1. The eagle was identified as a rare or endangered species in the Thurston County Comprehensive Plan.

2. The eagle has been identified as a threatened species in the State of Washington under the Endangered Species Act.

3. Substantial local public interest has been expressed through testimony and petitions to assure the continued use of the site by eagles.

4. Substantial testimony indicates that the Wood Point site is actively used by bald eagles both during winter and during the summer and that, at times, as many as three to five and even more eagles at one time use Lake Lawrence and the adjacent marsh for feeding and perching purposes. The attractiveness

of the site for perching purposes is supported by the fact that bald eagles were observed several times by staff and other personnel visiting the site during the application process. No other site considered by this Board for development purposes has shown such a history or intensity of use by bald eagles.

5. The Wood Point site is the best remaining site on the lake for eagles perching and feeding activities considering the present level of development on the lake due to the relative isolation and natural state of the site, the presence of a large dense understory or canopy to protect eagles from disruption and several emergent trees above the canopy from which eagles can view the lake or the marsh.

6. The Wood Point site appears to be the preferred site on the lake for perching eagles and that when disturbed from other locations, they fly to the protection of Wood Point.

7. The only similar site on the lake with respect to densely wooded cover and protection and access to undeveloped marsh lands is across the lake to the east with approximately one-half the emergent trees identified on the Wood Point site.

8. The inter-relationship between the Wood Point site and the surrounding areas is a

vanishing if not unique environment in Thurston County in that the site is dense wooded affording protection from ground disturbances; the site is surrounded to the east and north by a shallow well-stocked lake; to the west by undeveloped woodlands; and to the south by a marsh. The site has tall emergent snags or trees for use as perching sites. The lake in front of the site is relatively shallow and the marsh area to the southeast of the property has abundant water fowl and other bird populations which eagles use as a source of food.

9. The Board finds that very little is known about the overall importance of inland lakes to the eagle populations in Western Washington and Thurston County. The record shows that the site certainly may be important as a feeding and perching site to nonbreeding eagles. Nonbreeding eagles include all eagles for the first four or five years and the proportion of the adult eagles each year which are capable of breeding but which for one reason or another do not breed or locate nest sites.

10. The Board finds that the site is important to those eagles which do use the site regularly during the summer or use the site as a winter feeding and perching site. As sites such as this become developed or otherwise unsuitable for continued use, the eagles presently using the habitat are forced to find a less suitable habitat or to increase the pressure on the remaining suitable habitats. If the remaining habitats are

saturated or are also in the process of dwindling, the eagles will be forced to leave Thurston County. Such an event would be a significant environmental loss to Thurston County.

11. The Board finds that the public interest to be served requires the preservation of preferred perching and feeding habitat which is presently and has historically been actively used by eagles for perching and feeding and that such a public interest may only be served by permitting such development as will not adversely affect the usefulness of the site for its continued use as an active feeding and perching site by eagles.

C. The Board finds that the proposed plat as offered by applicant or as modified by the staff consistent with the findings of the Shorelines Hearings Board will be disruptive to the feeding and perching activities of eagles using the site and will not assure the continued availability of the site as an active feeding and perching site on Lake Lawrence.

1. The best way to assure continued use of the site as an active feeding and perching site is to keep development as low as possible and minimize the opportunity for eagles to view or be affected by human activity within 100 to 200 feet of the perching and feeding sites.

2. The proposed development contemplates 22 residential lots with 12 lots on the water side of the dirve and 10 lots on the upland side of the drive.

3. The applicant and staff have identified many of the larger trees or snags which have been identified as trees which are most suitable for use by eagles. These trees are shown on Exhibit A 8. (Volume X, Item 1 A 8) The trees identified as most favorable are located in the rearward portions of the lots set aside as a preserve.

4. The Board finds that during construction of the site, improvements, roads, utilities, pathways, community area, the site would be affected by ordinary construction activity including clearing trees for roadway and site improvements, grading and road building. The Board finds that such activity is noisy and has high levels of human activity which during the time of construction would adversely affect the use of the site by eagles for perching and feeding purposes.

5. The Board finds that during construction of individual homes the site will further be affected by construction activities including clearing and building activities. Clearing may involve up to 5,600 square feet for septic tank, drainfield, house, parking and driveway.

6. The Board find that once the site is fully developed and occupied, the lots will be a source of residential activity including noise, human activity, light and glare.

7. The Board finds that the clearing for roads, houses, driveway, septic tanks

and drainfields will remove a substantial portion of the understory or protective canopy on each of the lots; that if 5,600 square feet is in fact cleared more than 25-50 percent of the shoreward lots and approximately 25 percent of the rearward lots would be cleared not counting the clearing for roads and driveways. The Board further finds that with respect to the shoreward lots, the clearing and building activities will be between the water and most of the trees which have been identified as the favored perching sites. (For example, from the favored perches in lots 3, 4 and 5, the eagle must look across the cleared areas of lots 1 and 2 in a northerly direction, and the cleared areas of lots 6, 7 and 8 in a southeasterly direction which is the direction of the marsh and the primary waterfowl habitat adjacent to the site. Eagles in the protected trees in lots 6, 7, 8, 9, 20, 21 and 22 must also look across the areas cleared for residential and human activity to view the lake or the marsh.

8. The protective canopy is important in shielding eagles from human activity which is disruptive to eagles' feeding and perching activities. When such activity falls within a certain distance of the eagle, the eagle will stop feeding or perching and fly away; this distance known as the the flight distance.

9. The Board finds that the work by Victor Stahlmaster (Volume XII, Item 1 R 2) is the best work made available to the

Board on the issue of flight distances and disruption to perching and feeding eagles, and while the work was done on wintering eagles along a river, the conclusions reached appear to be applicable to inland lakes and are supported by other works and testimony in the record. The Board finds that such work is applicable and may be used for reference purposes along with the study by Mr. Kraus which supports Mr. Stahlmaster's observations on flight distance.

10. The Board finds that human activity within 200 feet of a perching or feeding eagle may be disruptive to the eagles depending upon the age and number of the eagles, the density of the understory and the nature of the human activity.

11. The Board finds that visual disturbances or visual and audio within 100 to 200 feet of perching and feeding eagles is disturbing to eagles and that a substantial number of eagles, more than one-half of the eagles, will be disturbed to flight at the approach of a human within 100 to 200 feet if the human activity is partially concealed. If the activity is in plain view, the percentage of eagles disturbed to flight will be even higher.

12. The Board finds that ordinary residential activity on lots 1, 2, 6, 7, 8, 9, 10, 19, 20, 21 and 22 is likely to be within 100 to 200 feet of the identified perching trees and snags on the site and is likely to be seen by eagles perching on the Wood Point site.

13. The Board finds that clearing for residential septic or roadway purposes on lots 1, 2, 6, 7, 8, 9, 10, 18, 20, 21 and 22 will remove a significant amount of the understory or protective canopy within 100 to 200 feet of the identified perching trees and snags on the site permitting eagles to see and, therefore, be disturbed by the human activity on such lots.

14. The Board finds that an unknown number of trees may be removed under the DNR criteria to permit the removal of trees for purposes of safety or to remove view blockage and that tree cutting regulations will be difficult to administer and enforce in an residential area once the plat is fully developed.

15. The Board finds that the plat posed by the developer when fully developed and in use will have a substantial likelihood of creating visual and audio disturbances which will be disturbing to perching or feeding eagles.

16. The Boards finds that full development of the plat as proposed by the developer or as modified by staff recommendations when fully developed, will change the character of the site from that of an active feeding and perching site, a preferred site, which offers a degree of refuge from human intrusion to a developed site which may be used occasionally, just as many other sites are in the developed portion of the lake, only when human activity is at a minimum.

17. The Board finds that the loss of the Wood Point site as an active feeding

and perching site is a significant environmental impact on bald eagles in Thurston County and on balance an impact that is not outweighed by the need for the type of development offered by the applicant and an impact which cannot be feasibly mitigated and retain 22 building sites in the configuration desired by the developer.

18. The Board finds that the difficulty of protecting the continued usefulness of the site for large raptors, including eagles, was identified as a need to be addressed in the EIS and the effectiveness of the mitigation offered was questioned in the Environmental Impact Statement.

19. The Board finds that the subdivision of the Wood Point site in the manner proposed by the applicant or as modified by staff to conform the plat to the recommendations of the Shorelines Hearings Board, does not meet the criteria of assuring the continued use of the site as an active feeding and perching site and, therefore, the approval of the preliminary plat of Wood Point is not in the public interest.

20. The Board finds that the potential effect of this plat on the continued use of the site by eagles was a specific adverse environmental impact identified in the environmental documents prepared pursuant to the State Environmental Policy Act.

21. The Board finds that none of the alternatives offered by the Applicant

adequately mitigate the impact of the proposed development on the continued usefulness of the site as an active feeding and perching site for eagles.

22. The Board finds that the impact of a 22-unit single-family residential development on the site's use and availability as an active perching and feeding site cannot be mitigated.

CONCLUSIONS OF LAW

The Board of Thurston County Commissioners hereby finds:

I. Platting Chapter 58.17 RCW

1. That the Board has jurisdiction to approve or deny preliminary plats of the type requested by applicant under Chapter 58.17 RCW.

2. That the Board has the authority to consider the public interest in approval or denial of a preliminary plat.

3. That given the finding that the public interest will not be served by the proposed preliminary plat, the Board has the authority to deny the preliminary plat.

II. State Environmental Policy Act, Chapter 43.21C RCW

1. Alternatively and in addition to the Board's authority under Chapter 58.17 RCW, the Board finds that the Board is required to consider alternatives under the State Environmental Policy Act, including the alternative of no action.

2. The alternative of no action is appropriate when the Board finds that a strong public interest exists in retention of a particular interest and no feasible means of mitigation is acceptable to the applicant.

3. That given the finding that the significant impact was identified in environmental documents and stated in these findings, the Board has the authority to deny the proposal on environmental grounds.

III. Other Permits

1. The Board finds that the issuance of development permits, including shoreline substantial development permits, for roads, septic tanks, wells, and other construction of physical improvements in a preliminary plat is premature and should not be issued unless and until the preliminary plat has been approved as required by Chapter 58.17 RCW.

2. The Board finds that the preliminary plat

is not approved and, therefore, that the other permits above shall not issue.

Respectfully submitted,

s/
MARJ YUNG, Chairman
BOARD OF THURSTON COUNTY
COMMISSIONERS

APPROVED by the Board of Thurston County Commissioners in open session this 30 day of May, 1978.

s/
County Auditor and Ex
Officio Clerk of the Board
of County Commissioners

PREPARED AND PRESENTED BY:

PATRICK D. SUTHERLAND
Prosecuting Attorney

By: s/
ALEXANDER W. MACKIE
Deputy Prosecuting Attorney

FILED:
5/8/1978

APPENDIX A - RECORD
SUPERIOR COURT, NO. 59965, APPELLANT'S APPLICATION AND AFFIDAVITS FOR PEREMPTORY MANDAMUS WRIT, 5/8/78 DAMAGES, FEES AND COSTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

IN THE MATTER OF: A SUBSTANTIAL DEVELOPMENT PERMIT DENIED BY THURSTON COUNTY TO LAKE LAWRENCE, INC.;	
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND LAKE LAWRENCE, INC.,	NO. 59975
Petitioners,	APPLICATION FOR WRIT OF MANDAMUS, DAMAGES, ATTORNEYS' FEES AND COSTS
v.	
THE BOARD OF THURSTON COUNTY COMMISSIONERS; COMMISSIONER MARJ YUNG; COMMISSIONER GEORGE BARNER, JR.; COMMISSIONER DEL PETIT,	
Respondents.	

I

PETITION FOR RELIEF

Come the petitioners, Lake Lawrence, Inc., a Washington corporation, which has paid its annual license fees and dues and is represented by its attorney, Philip P. Malone, of Poulsbo, Washington, and The State of Washington, Department of Natural Resources, which is represented by J. Lawrence Coniff, Jr., Assistant Attorney General for the State of Washington, and upon the allegations

herein made, and the affidavit of the petitioners in form and content as required by law, RCW 7.16.170, applies and prays to the Court, on proper hearing, for the following:

1.1 Issuance of a Peremptory Writ of Mandamus commanding the above-named respondents individually and as commissioners of Thurston County and jointly as the Thurston County Board of Commissioners on the receipt thereof, or at some other specified time, to issue and grant a "Substantial Development Permit" in substantial form and content as set forth in the petitioners' proposal, a copy attached hereto as: "Petitioner's Proposed Writ of Mandamus".

1.2 A determination and Award of Damages by the Court in Favor of the Petitioners against the Respondents, jointly and severally, as provided in RCW 7.16.260:

Judgment for Damages and Costs:

Such damages are to be awarded by the Court on subsequent hearings as set by the Court, after issuance of a Peremptory Writ of Mandamus. Damages to be awarded shall include statutory attorneys' fees and costs and damages as provided in the Shoreline Management Act of 1971, (SMA) (RCW 90.58.230).

II

JURISDICTION

This Court has jurisdiction of the parties and subject matter of the action as provided by law as follows:

2.1 Petitioners. Lake Lawrence, Inc. is a private corporation of the State of Washington, and

is the private owner of a 55-year-term leasehold estate, as Lessee, from the State of Washington, as Lessor, located and consisting of approximately fourteen acres of unimproved land located on the shoreline of Lake Lawrence in Thurston County, and subject to the SMA -- Shoreline Management Act -- effective June, 1971 (RCW 90.58) and designated by said act of land consisting of "shore lines of the state" composed of "wetlands" (" . . . those lands extending landward for two hundred feet in all directions, as measured on an horizontal plane from the ordinary high water mark; . . .": RCW 90.58.030), and uplands adjacent to said "wetlands". Such lands are also subject to the SMP -- Shoreline Management Program of Thurston County, adopted by Thurston County in December, 1975, pursuant to mandate by the SMA and deemed by law, RCW 90.58.100, to constitute "use regulations" for the various shore lines of the state. All of the land is also subject to SEPA -- State Environmental Policy Act, effective 1971 (RCW 43.21C); SEPA Guidelines, adopted December 12, 1975, effective January 16, 1976, and to TCO -- EPR -- Thurston County Environmental Policy Regulations, Ordinance No. 5172, adopted by the Board of Thurston County Commissioners, effective July 19th, 1976.

2.2 Petitioners: The State of Washington Department of Natural Resources is lessor of the land leased to Lake Lawrence, Inc., while acting under mandate of the law in its capacity as trustee of the University of Washington "grant" lands. By law, it is the duty of it to generate income from prudent management of the land for the constitutionally designated beneficiary, the University of Washington.

2.3 Respondents: The individual respondents are elected county commissioners of Thurston County and are the sole members of the Thurston County Board of Commissioners legally obligated to perform

certain acts as individual commissioners as a duty and trust or station and an obligation to the petitioner, Lake Lawrence, Inc., to the use and enjoyment of a right to use the land above stated within the meaning and intent of the law of Mandamus (RCW 7.16.160), and for which relief as a matter of right the petitioner is entitled to a Peremptory Writ of Mandamus.

As a Board of County Commissioners, the defendants were acting and obligated to act in a "quasi-judicial" capacity exercising powers thereof to hear applications made by Lake Lawrence, Inc., as authorized and directed by the laws and regulations of the State of Washington, and as agents of state law for the state and laws and regulations implemented and adopted by ordinances and regulations of Thurston County. The respondents, individually and as the Thurston County Board of Commissioners, have violated those duties and obligations.

III

PRIOR PROCEEDINGS

3.1 Submission of Applications by Lake Lawrence, Inc., Conferences and Hearings. The record of the entire proceedings on applications made and hearing are contained in: "Proposed Findings of Fact and Conclusions to Thurston County Board of County Commissioners - Re: 'Wood Point' - on Lake Lawrence Thurston County Case No. 225 and Sh-TCo-1-77, Submitted by Lake Lawrence, Inc., September 8, 1977". Each of the respondents and the Board was delivered a copy thereof prior to such public meeting by the Board as a matter of public record and will be offered in evidence at the time of hearing hereof. The Thurston County Board of Commissioners at no time on September 8th, 1977, or thereafter (prior to the hearing of the Shoreline's Hearing's [sic] Board) made any written

findings of fact or conclusions of law in decision of the applications made by the applicant, Lake Lawrence, Inc. The applicant received nothing in writing of the action taken by the Thurston County Board of Commissioners on applications for construction of a community dock, approval or disapproval of preliminary plat, or actions of approval or disapproval of environmental laws, policies and regulations thereof, and/or a decision to grant or deny a substantial development permit. The only notification in writing received by the applicant from the Board is set forth in a letter by the County Auditor of Thurston County to Mr. Art O'Neal, Director, Thurston Regional Planning, dated September 30th, 1977, following a letter to it from the Thurston County Planning Department, entitled Supplemental Report and Recommendation dated September 21st, 1977. Such letters are attached as Exhibit I hereof, and incorporated herein.

3.2 Shorelines Hearings Board of the State of Washington. After four days of extensive testimony, exhibits and arguments, February 14th through 17th, 1978, and on a hearing de novo, the Shorelines Hearings Board entered on March 23rd, 1978, its Findings of Fact, Conclusions of Law and Order reversing action taken by the Thurston County Board of Commissioners in denial of a shoreline "substantial development permit". Time for appeal of such by Thurston County, and any other parties, has expired, and the petitioners are entitled, by law, to the issuance of a substantial development permit by the Thurston County Board of Commissioners, in accordance with the decision of Shorelines Hearings Board No. SHB-77-37, entered March 23, 1978, a copy of which is attached hereto, marked Exhibit II.

3.3 Subsequent Hearings by Thurston County Board of Commissioners in Violation of the Law. On April 24th, 1978, the Thurston County Commissioners, after holding a hearing contrary to due

process of law, and without proper and adequate notice to the applicant, made decisions denying "substantial development permit", as required by the decision of the Shorelines Hearings Board. The public meeting was held by the Thurston County Board of Commissioners on April 18th, 1978, to review matters concerning the following:

(a) To appeal the decision of the Shorelines Hearings Board;
(b) To receive new testimony on the effect of development by the applicant on the environment of eagles;
(c) To decide on approval or disapproval of the preliminary plat, which had already been decided prior to the hearings of the Shorelines Hearings Board;
(d) To decide on a permit for variance on the community dock, altho [sic] the Board had made no prior decision on said application of the applicant at any time prior to the hearing of the Shorelines Hearings Board.

The Board decided: Negative on (a); heard testimony on (b); negative on (c), and negative on (d).

A copy of the record of the final decision on April 24th, 1978, is attached hereto as Exhibit III.

IV

ISSUES OF FACT AND LAW

There are no issues of fact or of law to be decided by the Court, and the petitioners are entitled to a Peremptory Writ of Mandamus in

accordance with its proposed Writ hereof, and in compliance with the decision of the Shorelines Hearings Board of March 23rd, 1978, which the respondents, in violation of the law, have circumvented, and declared to be "moot", and based their decision upon subjective standards of their own making and without reference to either the substance or procedure of the environmental laws of the State of Washington and Thurston County.

DATED, this 5th day of May, 1978.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL
RESOURCES

By: s/
J. Lawrence Coniff, Jr.
Asst. Attorney General

LAKE LAWRENCE, INC.

By: s/
Philip P. Malone,
Attorney

FILED:
5/8/1978

APPENDIX A - RECORD
SUPERIOR COURT, NO. 59965, APPELLANT'S APPLICATION AND AFFIDAVITS FOR PEREMPTORY MANDAMUS WRIT, 5/8/78 DAMAGES, FEES AND COSTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

IN THE MATTER OF: A SUBSTANTIAL DEVELOPMENT PERMIT DENIED BY THURSTON COUNTY TO LAKE LAWRENCE, INC.;	
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND LAKE LAWRENCE, INC., Petitioners, v. THE BOARD OF THURSTON COUNTY COMMISSIONERS; COMMISSIONER MARJ YUNG; COMMISSIONER GEORGE BARNER, JR.; COMMISSIONER DEL PETIT, Respondents.	NO. AFFIDAVIT OF PETITIONER DEPARTMENT OF NATURAL RESOURCES

STATE OF WASHINGTON)
) SS.:
COUNTY OF THURSTON)

I, RALPH BESWICK, being first duly sworn, on oath depose and say:

1. THE STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES is a petitioner herein, and in my capacity as Supervisor of the Department of Natural

Resources of the State of Washington, I have read the application for Writ of Mandamus made for it on its behalf and the behalf of Lake Lawrence, Inc., believe the same to be true and am authorized to and do make this affidavit on behalf of the State of Washington Department of Natural Resources.

2. It is my opinion that the State of Washington Department of Natural Resources has been and shall be harmed as lessor of lands to Lake Lawrence, Inc., and in its capacity, as mandated by law, to the prudent management of those lands for the State of Washington and the University of Washington and further lands by the decisions of the respondents herein. In effect, it is harmed as lessor by decisions of the respondents in making such lands of little or no economic value by leasing those lands or selling those lands contrary to the public interest when the Shorelines Hearings Board has by its decision of March 23, 1978, approved the development of those lands with conditions protecting the environment including the habitat of eagles. Such decisions of the respondents may further affect as a precedent the management of lands managed by the Department throughout the state where eagles may land and perch that have been found not essential to habitat of eagles, and for which reasonable restrictions can be made for their protection as contained in the proposal of Lake Lawrence, Inc. approved in accordance with law by the Shorelines Hearings Board on March 23, 1978.

EXECUTED this 8th day of May, 1978.

s/
Ralph Beswick
Supervisor of the Department of Natural Resources of the State of Washington

SUBSCRIBED AND SWORN TO, before me this 8th day of May, 1978.

s/
Notary Public in and for
the State of Washington,
residing at Olympia

FILED:
5/8/1978

APPENDIX A - RECORD
SUPERIOR COURT, NO. 59965, APPELLANT'S APPLICATION AND AFFIDAVITS FOR PEREMPTORY MANDAMUS WRIT, 5/8/78 DAMAGES, FEES AND COSTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

IN THE MATTER OF: A SUBSTANTIAL DEVELOPMENT PERMIT DENIED BY THURSTON COUNTY TO LAKE LAWRENCE, INC.;	)	
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND LAKE LAWRENCE, INC.,	)	NO.
Petitioners,	)	AFFIDAVIT OF PETITIONER LAKE LAWRENCE INC.
v.	)	
THE BOARD OF THURSTON COUNTY COMMISSIONERS; COMMISSIONER MARJ YUNG; COMMISSIONER GEORGE BARNER, JR.; COMMISSIONER DEL PETIT,	)	
Respondents.	)	

STATE OF WASHINGTON)
) SS.:
COUNTY OF THURSTON)

I, GEORGE PALLIS, being first duly sworn on oath depose and say:

1. LAKE LAWRENCE, INC. is one of the petitioners herein, I am the President thereof, and as the affiant have read the Application for Writ of

Mandamus made for it in its behalf together with exhibits thereof, and believe the same to be true, and, as President of said Lake Lawrence, Inc. am authorized to make this affidavit in its behalf.

2. LAKE LAWRENCE, INC. is a profit corporation of the State of Washington that has paid all of its annual license fees and dues to the State of Washington. It is the owner, as lessee, of a leasehold estate from the State of Washington, Department of Natural Resources -- 55-year-term -- commencing in September, 1977, and the owner located on the shoreline of Lake Lawrence in Thurston County, consisting of approximately 14 acres of unimproved land known as "wetlands" fronting the shoreline and contiguous and adjacent to drylands of one parcel designated as "Rural Environment" by the Thurston County Shorelines Master Program. It is also the owner of 100 feet of a leasehold estate of lands 100 feet beneath the waters of Lake Lawrence adjacent to the shoreline of the uplands extending outward a distance 100 feet in equal directions therefrom from the DNR for a like term for the construction and use of docks and/or piers.

3. LAKE LAWRENCE, INC. has complied with all laws, policies, rules and regulations relating and applicable to all of its lands and has been denied the use thereof in accordance with its proposal, approved by the Shorelines Hearings Board decision of March 23, 1978, caused by the action of the respondents.

4. LAKE LAWRENCE, INC. has modified and, at costs and expenses in the proximate sum of $40,000.00, COMPLIED with those laws, etc., by way of outstanding experts in the field of environment and biology especially related to eagles and their environment in presentation of conferences and hearings commencing with applications made to Thurston County for permit approvals January 12, 1977 through the hearing by the Shorelines Hearings

Board February 14 to 17, 1978. Such effort has been to no avail because of the actions of the respondents, causing a denial of the use of the land in accordance with the decision of the Shorelines Hearings Board.

5. If the decision of the respondents continues, it is the opinion of the affiant that Lake Lawrence, Inc. shall suffer irreparable damages by way of the following:

(a) Change of economic conditions rendering the use of the land as authorized not feasible;

(b) Condemnations of the ownership of the use of the land by the respondents without compensations and without due process of the law;

(c) Denial of use of the land for which there is no adequate legal remedy caused by actions of the respondents based upon subjective standards of their own making, without reference to laws, rules and regulations of the State of Washington and Thurston County governing the regulation of environment as authorized by the laws of the State of Washington.

EXECUTED this 5th day of May, 1978.

s/
George Pallis

SUBSCRIBED AND SWORN TO before me, this 5th day of May, 1978.

s/
Notary Public in and for the State of Washington, residing at Poulsbo, WA.

FILED:
7/6/1978

APPENDIX A - RECORD
SUPERIOR COURT - 7/6/78 STIPULATION AND ORDER
ON ISSUES UNDER REVIEW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., a Washington corporation, Petitioners, v. THURSTON COUNTY, et al, Respondents. and ROY HARRISON, et al, Intervenors.	NO. 5 8 6 2 3 STIPULATION AND ORDER ON ISSUES UNDER REVIEW

THIS MATTER comes before the Court by stipulation of the parties, Lake Lawrence, Inc. represented by Philip P. Malone; State of Washington Department of Natural Resources represented by J. Lawrence Coniff; Board of Thurston County Commissioners represented by Alexander W. Mackie; Intervenors, Roy Harrison, et al represented by Thomas H.S. Brucker; and

WHEREAS the parties wish to clarify the issues to be considered on review by the Court and to provide all parties and the Court time to adequately consider the issues raised in Petitioners' briefs;

The parties hereto do stipulate as follows:

1. The parties agree there is one issue of law for the Court to consider; that is whether Respondents, on April 24, 1978 and thereafter, on deciding not to appeal the Shorelines Hearings Board judgment, had constitutional and legislative authority to do the following:

(a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle habitat) having already been presented to the Shoreline Hearings Board;

(b) Make a decision on the record before the Shoreline Hearings Board and the evidence at new public hearings contrary to and in conflict with the prior Shoreline Hearings Board judgment on the same matter;

(c) Enter Findings of Fact, Conclusions of Law, and Judgment contrary to and in conflict with the Shoreline Hearings Board Judgment of March 23, 1978.

2. If the answer to the issue stated above is affirmative, Petitioners and Respondents agree to the following stipulations:

(a) That there is no issue that Respondents were "arbitrary and capricious" in making their Findings of Fact dated May 30, 1978 in that the Findings of Fact are supported by some evidence in the record and that there is room for two opinions on the issues of fact considered;

(b) That any appeal from the Court's decision herein may be consolidated with any appeal by either party from the Court's decision in State of Washington, Department of Natural Resources, et al v. Board of Thurston County Commissioners, et al, Roy Harrison, et al, Intervenors, Thurston County Superior Court cause number 59975 (the mandamus action).

3. If the answer to the issue posed in item one (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), then the matter of damages of the Petitioner will be scheduled for a separate hearing before the Court, without prejudice to any defense, legal or equitable, which may be raised by Respondents herein.

4. Respondents and Intervenors shall have until July 17, 1978 to file answering briefs to Petitioners' briefs in this matter. Petitioners shall have until July 24, 1978 to file any reply briefs. The matter shall be set for argument (approximately one-half (1/2) day) on the issues of law presented herein as soon after July 24, 1978 as is convenient to the Court. The parties agree the matter may be heard in Thurston County or in San Juan County at the convenience of the Court. The parties request that the Court take the matters herein under advisement until such time as argument can be heard.

DATED this 6th day of July, 1978.

s/
PHILIP P. MALONE
Attorney for Petitioner,
Lake Lawrence, Inc.

s/
J. LAWRENCE CONIFF
Assistant Attorney General
for Petitioner, State of
Washington Department of
Natural Resources

s/
ALEXANDER W. MACKIE
Special Deputy Prosecuting
Attorney for Respondent,
Board of Thurston County
County Commissioners

s/
THOMAS H.S. BRUCKER
Attorney for Intervenors,
Roy Harrison, et al

O R D E R

THIS MATTER having come before the Court upon stipulation of the parties and it being the finding of the Court that the stipulation be entered and binding on all parties, therefore it is hereby

ORDER, ADJUDGED AND DECREED that the stipulation be entered as part of the record in this case, that it be binding on all parties hereto and that pursuant to said stipulation, a further hearing on this matter shall be scheduled for July 28, 1978 - 12:30 p.m.

DONE IN OPEN COURT this 6th day of July, 1978.

s/
JUDGE

FILED:
7/6/1978

APPENDIX A - RECORD
SUPERIOR COURT - 7/6/78 STIPULATION AND ORDER
ON ISSUES UNDER REVIEW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE INC., a Washington corporation, Petitioners,	)	NO. 5 9 9 7 5
v.	)	ORDER DENYING ENTRY
THURSTON COUNTY, et al, Respondents.	)	OF FINAL ORDER AND JUDGMENT OF RESPON-
and	)	DENTS AND CONSOLI-
ROY HARRISON, et al, Intervenors.	)	DATING THIS MATTER FOR HEARING, FIND- INGS AND JUDGMENT WITH CAUSE NO. 58623

THIS MATTER having come on for hearing on this 6th day of July, 1978, upon motions made by the petitioners for reconsideration of oral opinion made by the court on the 22nd day of May, 1978, hereof and motion for denying entry of proposed final order and entry of judgment by respondents dismissing application for writ of mandamus herein, arguments having been heard and brief for the parties having been considered and in pursuant to Civil Rules of Superior Court Rule 42 (a) Consolidation, now therefore,

ORDERED that all further hearings, findings and judgment herein are hereby consolidated with Cause No. 58623 and the records and files herein are hereby directed to be so consolidated; and

ORDERED that the entry of the Final Order and Judgment proposed by the Intervenor-Respondents is hereby denied [reserved] and that all other motions of either party are subject to being heard in the hearings of Cause No. 58623 (Writ for Review on application by petitioners).

DONE IN OPEN COURT this 6th day of July, 1978.

s/
Judge Hewitt Henry

Presented by:

s/
Philip P. Malone
Counsel for Lake Lawrence, Inc.

s/
J. Lawrence Coniff, Jr.
Counsel for State of Washington
Department of Natural Resources

FILED:
8/11/1978

APPENDIX A - RECORD
SUPERIOR COURT - 8/78 MEMORANDUM OPINION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE INC., a Washington corporation, Petitioners,	)	NO. 58623 NO. 59975
v.	)	MEMORANDUM OPINION
THURSTON COUNTY, et al, Respondents.	)	

The Court has reviewed the numberous files and documents in the matter including the entire record submitted for review; the numerous briefs; has considered the stipulation of the parties dated July 6, 1978; has heard argument of counsel and believes the issues to be as follows:

1. Is the respondent bound by the decision of the shoreline hearings board on the issue of whether or not the proposed plat should be denied on environmental issues, specifically the use of trees on the property for eagle perching sites, or reasons related to its use by eagles.

2. If the respondent is not bound by the ruling of the shoreline hearing board, is their action prohibited by the Washington and Federal constitutional prohibition against the taking of private property without compensation.

3. If the respondents are not prohibited by the ruling of the shoreline hearing board or the

constitutional provision, are their actions approving the plat "clearly erroneous" and related thereto does the "clearly erroneous" or "arbitrary" standard govern the court's review.

While the Court recognizes that the stipulation of the parties executed July 6, 1978 refers to the legal issue as being "one issue of Law" the best the Court can make from the stipulation is that the parties agreed there was some evidence upon which the respondent county commissioners could base their decision of April 24, 1978 denying both the shoreline substantial development permit and the preliminary plat.

The Court considers the following facts to be undisputed.

1. The Petitioners meet all the requirements of the County for platting save one, "public interest" which the respondent believes grants them the authority to deny the plat on environmental issues, in this case to preserve the property for the perching of eagles.

2. The respondents after a full hearing before the shoreline hearing board on the same environmental issues, i.e. the need to preserve the property for perching eagles, and after an adverse ruling elected not to appeal the ruling.

3. The record contains no evidence from which the respondents could conclude that the trees on petitioner's property are used by eagles for anything other than perching, or are necessary to the preservation of this species.

4. The property in question was considered a part of the comprehensive shoreline management master plan for the county and was designated and zoned for rural environment which allows the residential development proposed by petitioners.

I.

The Shoreline Management Act (S.M.A.) and the State Environmental Policy Act (S.E.P.A.) are both intended primarily to protect the environment. Ecology v. Pacesetters 89, Wn. (2) 203. One of the express purposes of S.M.A. is "a clear, and urgent demand for a planned, rational, and concerted effort, . . . to prevent the inherent harm in uncoordinated and piecemeal development of the states boundaries." RCW 90.58.020.

To protect as much as possible against an unconstitutional taking of property and to provide due process, the act provides for appeals from decisions of the county authorities to a board acting in a quasi judicial capacity (RCW 90.58.170) and judicial review of the S.H.B. is allowed by the Act. RCW 90.58.180.

S.E.P.A. was intended by the legislature to require environmental factors to be considered in major actions likely to affect the environment and both S.M.A. and S.E.P.A. address basically the same issues. The question we are concerned with on the first issue referred to above is how many times must an applicant litigate the same issues? If a county can simply disregard the decision of the Shoreline Hearing Board on an issue submitted to it for review, does that not in effect destroy the rights granted an applicant for a substantial development permit to appeal to the board and render meaningless the statutory authority of the board to review the denying of a permit? This Court feels both questions must be answered in the affirmative and that the county does not have authority to review and for all intents and purposes overrule the Shoreline Hearings Board's decision on the same issues. It's obvious the respondent elected not to appeal the S.H.B. decision knowing it could not sustain the burden on

appeal necessary for a reversal. If the present practice is permissable, they then shift the burden to the petitioner, who was sustained by the S.H.B. These tactics, it appears to this Court, subvert the legitimate purpose of S.M.A. and S.E.P.A. to protect the environment and make those acts the means by which private property may only be used by consent on one's neighbors. The Court is persuaded by the opening brief of petitioner on this point and by the authorities cited therein.

II.

The Court recognizes that this matter will undoubtedly be appealed and, in order to facilitate a review of all the issues submitted, I believe should express its opinion on one remaining issue.

Does the action of the respondent constitute an unconstitutional taking or attempted taking. The respondent denies that the action taken would prohibit all productive use of the property. This Court recognizes that in determining this issue, it must use the balancing test. "This question is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property." (Maple Leaf Investors, Inc., v. Dept. of Ecology 88 Wn (2) 726.) See also Ecology v. Pacesetters 89 Wn (2) 203.

The question, therefore, is; does the public interest in perching of eagles on this property justify the denial of the proposed plat. It is conceded that there is no evidence the proposed plat will affect the survival of eagles, counsel suggests the preservation of the presence of eagles within the area, i.e. Lawrence Lake justifies the County's action. The Court believes that the actions of the respondents will destroy the

property for all practical human uses. This will result in a rezone of the property for the purpose of preserving the property to the benefit of the residents in the area, i.e. to have eagles perch there. Note the action of the commissioners in requesting the Planning Commission to look into redesignating the property's natural environment. The Court, therefore, also concludes the action would be an unconstitutional taking.

The Court, therefore, reverses the action of the Respondent, orders the issuance of the substantial use permit and approval of the preliminary plat as approved by the Shoreline Hearing Board subject to such other requirements unrelated to the environmental issues as are required for plat approval.

s/
Richard L. Pitt
Superior Court Judge

FILED:
9/25/1978

APPENDIX A - RECORD
SUPERIOR COURT - 9/78, FINDINGS, CONCLUSIONS OF LAW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE INC., a Washington corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT AND MARJ YUNG, constituting THE BOARD OF THURSTON COUNTY COMMISSIONERS, Respondents.	)	NOS. 58623 and 59975 (Consolidated) FINDINGS OF FACT and CONCLUSIONS OF LAW

I.

1.1 Date. July 28, 1978.

1.2 Judge. Richard L. Pitt.

1.3 Appearances. Petitioner State of Washington, Department of Natural Resources appeared by its attorney, J. Lawrence Coniff, Jr., Assistant Attorney General; petitioner Lake Lawrence, Inc. appeared by its attorney, Philip P. Malone; respondent Thurston County and the individual members of the Board of Thurston County Commissioners appeared by their attorney, Alexander W. Mackie; and intervenors Roy Harrison, et al., appeared by their attorney, Thomas H.S. Brucker.

1.4 Witnesses and Exhibits. No witnesses were called by any party. The Court has considered the record of proceedings before the Board of Thurston County Commissioners consisting of Volumes I through IV; the record of proceedings before the Shorelines Hearings Board, Docket No. 77-37 consisting of Volumes V through XII and the record of proceedings before the Board of Thurston County Commissioners on April 18 and 24, 1978, consisting of Volume XIII, all of which were admitted into evidence by stipulation of the parties.

II. FINDINGS OF FACT

The Court, being fully advised in the premises, finds:

2.1 Shoreline Hearings Board Decision. Lake Lawrence, Inc. leased approximately fourteen acres of a shoreline area lying adjacent to Lake Lawrence known as Wood Point for a term of fifty-five years commencing on September 1, 1976. Lake Lawrence, Inc. proposed to develop the site into single family residences in accordance with the terms of said lease and in reliance upon the rural use designation given the Wood Point site by Thurston County. The events leading to this litigation are well summarized in the final Findings of Fact made and entered by the Shorelines Hearings Board, State of Washington, in Docket No. 77-37, Findings of Fact Nos. I through IX. The Shorelines Hearings Board, after a contested hearing, fully considered all environmental impacts claimed by respondents to be applicable to petitioners' entire proposed development, and considered the impact of the proposed development on eagles, and reversed the denial of petitioners' requested permit.

2.2 Final Environmental Impact Statement. Since entry of the final Findings of Fact, Conclusions of Law and Order by the Shorelines Hearings

Board in Docket No. 77-37 on March 23, 1978, the Final Environmental Impact Statement for the proposed development on Wood Point has not been supplemented, altered or amended by Thurston County, the author and sponsor of said document as "lead agency."

2.3 Attempted Rezone During Pendency of Appeal. While denying both the application for a preliminary plat and a shoreline permit, respondents instructed its planning staff to consider redesignation of the Wood Point site.

2.4 County's Failure to Appeal. After rendition of the decision of the Shorelines Hearings Board in its Docket No. 77-37, Thurston County elected not to appeal it or the Findings and Conclusions therein to the courts.

2.5 Taking of Evidence by County. On April 10, 1978, after receipt of the Shorelines Hearings Board's decision, the Thurston County Commissioners met on a view trip to the Wood Point site with intervenors. During their meeting at the Wood Point site, the individual commissioners voiced their disagreement with the decision of the Shorelines Hearings Board. The Commissioners received evidence at said meeting and made personal observations.

2.6 Plat Rejection. The Thurston County Commissioners, specifically found that petitioners' proposed project on Wood Point met all objective platting requirements, but rejected the proposed plat on the grounds of "public interest." Their decision regarding public interest was based upon environmental grounds, which were considered and decided by the Shorelines Hearings Board. The decision of the Thurston County Board of Commissioners is inconsistent with the findings of the Shorelines Hearings Board, Docket No. 77-37, on the

question of whether or not Wood Point is used by eagles for nesting, winter roosting or feeding. The Shorelines Hearings Board found that Wood Point is only an incidentally used perching area for eagles and is not critical or important to their habitat needs.

2.7 Alternative Conditions. After denying petitioners' application for plat approval and refusing to issue the requested substantial development permit as ordered by the Shorelines Hearings Board, respondent Board of County Commissioners thereupon entered "alternative" findings regarding the requested plat approval. These new "alternative" conditions would apply to the requested plat only if a court reversed their decision to deny it.

III. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact, the Court makes and enters the following Conclusions of Law:

3.1 Shorelines Hearings Board Decision. The final Findings of Fact and Conclusions of Law and Order of the Shorelines Hearings Board in Docket No. 770-37 dated March 23, 1978 are attached hereto. At the time petitioners filed their appeal, the Shorelines Hearings Board acquired jurisdiction to consider all environmental impacts of petitioners' proposed project on Wood Point under the Shoreline Management Act and the State Environmental Policy Act, and did consider the impact upon eagles in Thurston County which the entire plat would have. Judicial review of a decision of the Shorelines Hearings Board is allowed by statute. Because respondents elected not to appeal said decision, they are bound thereby. The Findings of Fact and Conclusions of Law entered by the Shorelines Hearings Board are also binding upon this Court.

3.2 No Adequate Remedy. Petitioners have no adequate remedy at law.

3.3 Jurisdiction. This Court has jurisdiction of parties and the subject matter of this action.

3.4 Public Interest. The "public interest" clause of the Thurston County platting ordinance and RCW 58.17.110, as applied to this case by respondents, is unconstitutionally vague and violates the due process clause of both the State and Federal Constitutions.

3.5 Legislative Intent Re Platting. Respondents' reliance upon authority derived from the public interest clause of the platting statutes (RCW Chapter 58.17) is improper and unwarranted. The authority conferred by such statutes relates solely to criteria for platting. The legislature declined to grant authority to deny plats on environmental grounds under the public interest clause because such matters are addressed by both the Shoreline Management Act and the State Environmental Policy Act. Respondents' refusal to issue the requested substantial development permit after they decided not to appeal the Shorelines Hearings Board's decision, supra, is unlawful (RCW 58.17.180). Respondents do not possess the authority to "moot" the decision of the Shorelines Hearings Board by utlilizing the device of denying the requested plat approval on "environmental grounds" which were already litigated before the Shorelines Hearings Board. The legitimate purposes of the State Environmental Policy Act and the Shoreline Management Act would be subverted by such action.

3.6 Substantial Development Permit. Petitioners are entitled, as a matter of law, to an order requiring respondent to issue the substantial

development permit as ordered by the Shorelines Hearings Board.

3.7 Plat Approval. Petitioners are entitled, as a matter of law, to an order requiring respondents to approve their proposed plat with the exception of the dock proposed therein, for which petitioners must secure the necessary permits.

3.8 Rezone of Wood Point. Petitioners have a right to rely upon the zoning of the Wood Point property as "rural" and the Shorelines Hearings Board decision, supra.

3.9 Public Interest to the Use of Property. After balancing the public interest in legitimate governmental regulation of the use of property versus the rights of petitioners to their proposed use of Wood Point, the Court concludes that alleged public interest in maintaining perching sites for eagles on the Wood Point property does not justify the denial of the proposed plat, and would constitute an unconstitutional taking.

DONE IN OPEN COURT this ____ day of September, 1978.

s/
JUDGE RICHARD L. PITT

FILED:
9/25/1978

APPENDIX A - RECORD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE INC., a Washington corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT AND MARJ YUNG, constituting THE BOARD OF THURSTON COUNTY COMMISSIONERS, and as individuals, Respondents.	NOS. 58623 and 59975 (Consolidated) ADJUDICATION PURSUANT TO WRITS OF MANDAMUS AND CERTIORARI

It is ordered that the above-entitled matter should be and the same is hereby remanded to respondents, with directions that they promptly grant the substantial development permit and approve the preliminary plat in conformance with the Court's Findings and Conclusions heretofore entered.

It is further ordered that the Court shall continue jurisdiction of this case as to all matters relating to compliance by respondents with this writ.

It is further ordered that the Court hereby reserves for a later hearing any issues of the respondents liability for damaged to plaintiff and the amount thereof.

DONE IN OPEN COURT this 21st day of September, 1978.

s/
JUDGE RICHARD L. PITT

APPENDIX A - RECORD
SUPERIOR COURT, APPELLANT'S 9/26/78
NOTE FOR TRIAL SETTING

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE INC., a Washington corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT and MARJ YUNG, constituting THE BOARD OF THURSTON COUNTY COMMISSIONERS, Respondents.	Consolidated Causes Cause No. 58623 Cause No. 59975 NOTE FOR TRIAL SETTING (DAMAGES)

TO: Respondents (Thurston County and Thurston County Commissioners), c/o their attorney Alexander W. Mackie;
Intervenor-Respondents, c/o their attorney Thomas H.S. Brucker;
Petitioner, State of Washington, Department of Natural Resources, c/O their attorney, J. Lawrence Coniff, Jr.:

EACH OF YOU ARE HEREBY notified that there shall come on for hearing commencing at 9:30 a.m., November 20, 1978 and November 21, 1978, a trial for damages in the Courtroom of the Honorable Richard L. Pitt, Superior Court of Island County, Coupeville, Wa.

The Clerk has been requested to set and confirm such time by notice to the attorneys therein for hearing on that date.

DATED this 26th day of September, 1978.

s/
Philip P. Malone
Attorney for Lake Lawrence, Inc.

APPENDIX A - RECORD
SUPERIOR COURT - APPELLANT'S 9/78,
AMENDED PETITION FOR DAMAGES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE INC., a Washington corporation, Petitioners, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT and MARJ YUNG, constituting THE BOARD OF THURSTON COUNTY COMMISSIONERS, Respondents.	NOs. 58623 and 59975 (Consolidated) AMENDED PETITION FOR DAMAGES BY LAKE LAWRENCE, INC.

COMES NOW the Petitioner, Lake Lawrence, Inc., and petitions the Court for loss directly and proximately caused by the unlawful actions and non-actions of the Respondents, to-wit: (1) Unlawfully failing to issue on application being made by the Petitioner a substantial development permit; (2) Unlawfully failing to approve a preliminary plat of a subdivision of 24 lots; (3) Unlawfully omitting to act on a variance application by the Petitioner for the construction and use of a community dock. The Respondents by such actions and non-actions denied use by the Petitioner and others, to whom it would sublease lots, use of its property and, as a proximate consequence of such loss, the Petitioner has suffered and shall continue to suffer damages.

The Petitioner claims that Thurston County at all times hereinafter stated was and is liable as

principal, respondent-superior, jointly and severally with the individually Respondent Commissioners and that for the unlawful actions, or non-actions, of the Respondent-Commissioners at all times hereinafter stated were unlawful for themselves individually and as agents for the apparent benefit of Thurston County but for the real benefit of the intervenor Respondents.

The Court has jurisdiction to award damages for the unlawful actions and non-actions of the Respondents and damages resulting as a consequence for the loss suffered by the Petitioner directly and proximately caused by the conduct of the Respondents as follows:

I.

JURISDICTION

The Court has jurisdiction in accordance with the following:

1.1 September 21, 1978. Adjudication pursuant to Writs of Mandamus and Certiorari. The Court has on September 21, 1978, entered its order herein reserving jurisdiction over this matter.
1.2 Stipulation. Stipulation of the parties of July 6, 1978 on file herein.
1.3 Parties and Subject Matter. The parties and property of the Petitioner are before this Court in actions for violations of law by the Respondent as hereinafter stated.

II.

VIOLATIONS OF LAW CAUSING LOSS

2. Shorelines Management Act of 1971. (SMA).
2.1 September, 1977.
The Respondents violated the SMA in September, 1977 in not issuing a substantial development

permit to the Petitioner and approval of its preliminary plat for 24 sub-divided residential lots, and omitting to act on granting a variance and permit for the development of a community dock on the shoreline of such property by failing to comply with the SMA. The Respondents have more particularly ignored the regulation of Thurston County as set forth in its Shoreline Master Program (SMA) regulating the use of the property as designated for "Rural Environment", regulating such use primarily for single family residences, with which the application of the Petitioner was "consistent" and in conformance with the use of owners of adjacent property in the neighborhood. The Respondents have denied human use of the property by the Petitioner for the purpose of the use by eagles when the SMA and the SMP of Thurston County did not provide or regulate the use of the Petitioner's property for that purpose.

Such actions and non-actions of the Respondents directly caused the Petitioner, in order to mitigate its damages, to appeal the decision of the Respondents of September 28, 1977 and as required by law to exhaust its remedies to the Shorelines Hearings Board (SHB) and to the Court for review.

2.2 March 23, 1978, SHB Decision

In addition the Respondents violated the SMA after March 23, 1977, after the Petitioner had "exhausted its remedies" before the SHB and the SHB had made its decision on that date. The Respondents have held subsequent proceedings in April and May, 1978, not provided by law and denied the Petitioner a substantial development permit, approval of its preliminary plat and denial of variance for community dock on the same issue of fact, use of eagles, that the Shorelines Hearings Board had decided as to the issues before it. Such actions and non-actions caused the Petitioner to further proceed with its proceedings herein for review and mandamus actions.

2.3 Violation of SMA.

The specific statutory language which the Respondents violated of the SMA is RCW 90.58.230, stating in (2)(b):

> "A permit shall be granted: (Emphasis Added)
>
> . . . .
>
> (b) After adoption or approval, as appropriate, by the department of an applicable master program, only when the development proposed is consistent with the applicable master program and the provisions of chapter 90.58 RCW."

The Respondents, in September, 1977, failed to enter any finding or decision related to the use of the property by the Petitioner on its application as provided in said statute, although by mandate required to do so.

The Respondents, after March 23, 1978 (SHB Decision) did further ignore said statute and failed to act in accordance with the SHB Decision of March 23, 1978 as required by the SMA.

2.4 Platting Statute, RCW 58. et al.

2.4.1 September 1977 and March 23, 1978 (et al).

The Respondents violated and without authority in September, 1977, denied approval of the preliminary plat of the Petitioner for 24 lots and by non-actions omitted to rule on application for variance and issuance for permit for development of a community dock and a substantial development permit for subdivision of the property of the Petitioner. Also, after the decision of the SHB, the Respondents held hearings not provided by law and denied a substantial development permit, approval of the preliminary plat and did for the first time rule on the community dock. Such actions and non-actions further caused the Petitioner, in order to mitigate its damages, to continue with its review proceedings in this Court and institute a mandamus action herein. The

non-actions of the Respondents in not ruling in September, 1977 as to the community dock variance has caused loss to the Petitioner by its requiring to separately institute additional proceedings on appeal before the Shorelines Hearings Board which are now pending that would not have otherwise have been required if the Respondents had acted upon the application of the Petitioner as to the community dock, in September, 1977, whereby the Petitioner could have exhausted its remedies at the hearing before the SHB in February, 1978.

2.4.2 Violations of RCW 58.17.110; 58.17.010 and 58.17.180.

The Respondents specifically violated the purpose and authority set forth in RCW 58.17.110 and RCW 58.17.010 and by their actions and non-actions acted as a matter of law "unlawful", "arbitrary", or "capricious" in accordance with RCW 58.17.180.

2.5 State Environmental Protection Act (SEPA).

2.5.1 September, 1977.

The Respondents and Thurston County through its Planning Department violated the provisions of SEPA and the local SEPA ordinance of Thurston County, after time had expired in May, 1977 and July, 1977 for comments by public agencies on the Final Environmental Impact Statement (FEIS), by soliciting and accepting comments from the State Game Department and the United States Fish and Wildlife Service on the use of the site as an eagle habitat and, from such comments received, made new recommendations for rezoning the property for sole use of eagles. In September, 1977, the Thurston County Commissioners violated such laws by following such recommendations and denying the application before it by the Petitioner, causing the Petitioner to bring in new evidence to rebut such actions in September, 1977, and commence review proceedings before this Court. Such actions of Thurston County and the Respondents-Commissioners were in violation of the process and procedure of

SEPA, provided by law, causing loss to the Petitioner and without an adequate remedy to recover damages for such loss, except as provided herein.

2.5.2 April, 1978.

On April 10, 1978, contrary to any procedure and law of SEPA, the Respondents while acting as a "quasi-judicial" body, did visit the site and make an investigation in the presence of others without the presence of anyone for the Petitioner. On April 18, 1978, contrary to any procedure provided by SEPA, SMA or RCW 58, the Respondents did hold a public hearing at which they received comment of a Robert V. Jensen of the Department of Ecology who commented on and testified contrary to the FEIS and the Department of Ecology's response to the Draft Environment Impact Statement (DEIS) and the FEIS of 1977. Such actions were in violation of the law and caused further damages to the Petitioner as hereinafter stated.

2.6 Fifth and Fourteenth Amendment of the United States Constitution.

The Respondents by their actions set forth in Paragraphs 2.5.1 and 2.5.2, above stated, violated the procedural and substantive due process requirements of the United States Constitution, to-wit: (1) Ignoring and acting contrary to the provisions of SEPA, SMA and RCW 58 and (2) the "fairness doctrine" as set forth by the State of Washington Supreme Court. Such violations have occurred from September, 1977 to the present time. By such violations, they have taken "temporary use" of all of the private property of the petitioners for public use without just compensation until such actions are remedied and permits issued, and have taken two lots of the private use of the Petitioner and others permanently for public purpose without just compensation. Such actions and non-actions have caused the Petitioner damages for which they are entitled to recover.

2.7 Violation of Constitution of State of Washington.

The Respondents have violated Article II, Section 11 of the State of Washington Constitution by actions and non-actions above-stated in the exercise of unlawful local police power contrary to and in conflict with the general laws of the State of Washington, to wit: RCW 58; SEPA; SMA; and the Fifth and Fourteenth Amendment of the United States Constitution, which have directly and proximately caused loss to the Petitioner and as a consequence thereof property damage and costs herein.

III.

DAMAGES

3.1 Damages Caused by Loss.

The Petitioner has and shall continue to suffer the following damages resulting from and as a consequence of the unlawful actions and non-actions by the Respondents directly and proximately denying use of the leasehold estate of the land by the Petitioner by denying permits applied for by the Petitioner:

3.2 Property Damages: "Temporary Taking" - Loss of Rental Income.

3.2.1 From September 8, 1977 to September 8, 1978, Annual Loss of Use of 24 Subdivided Lots With Land Improvements for Residential Use:

Benefit

Waterfront Lots

14 lots at Fiar [sic] Market
Annual Rental of 10% times Net
Fair Market Value of fee title
($20,000.00 each lot less 20%
for sales and advertising

$224,000.00 ($16,000 x 14) x 10% $22,400.00

Back Lots

10 lots at Fair Market Annual Rental of 10% times Net Fair Market Value of fee title ($10,000.00 each lot less 20% for sales and advertising	
$80,000.00 (8,000.00 x 10) x 10%	8,000.00
TOTAL ANNUAL RENTAL BENEFIT RETURN	$30,400.00

Less Burden

Capital Cost of Improvements of $75,000.00 amortized over 25 years with interest at 10% per annum	
$681.53 per month x 12	($ 8,177.00)
Annual Lease Payment to DNR	($ 3,120.00)
NOTE: 12% excise tax of $3,125.00 x 12 = $375.00 paid by tenants	not accounted
TOTAL ANNUAL RENTAL BURDEN	($11,297.00)
TOTAL ANNUAL LOSS OF RENTAL INCOME (BENEFIT LESS BURDEN)	$19,103.00

3.2.2 Loss Per Day After September 8, 1978:
$19,103.00 divided by 365 days = $52.33 per day (to be assessed)

3.3 Permanent Taking of Leasehold Estate of two waterfront lots for fifty years plus:

Benefit

2 waterfront lots at $16,000 Net Fair Market fee value each at 10% per annum: $3,200.00 for 50 yrs.	$ 3,200.00
Burden	
Share of Improvement Costs of $75,000.00: $8,177 divided by 24 = $340.17 x 2	(681.42)
	$ 2,518.58
Less proportionate share of DNR Lease payment $3,120.00: $3,120.00 divided by 24 = $130.00 x 2	(260.00)
Total Annual Net Less Payment 2 waterfront lots	$ 2,258.58

Capitalized Value for 50 Years

Capitalized Flow of Net Income for 50 years using Inwood Factor for Apprisal at 10% return - with calculated discount.

Inwood Factor For 50 years:

9.915 x $2,258.58
TOTAL LOSS FOR PERMANENT TAKING OF 2 WATERFRONT LOTS FOR 50 YRS. $22,393.00+

3.4 Expenses Incurred by Petitioner's Attorney and Reimbursable by Petitioner:

Reference: Attached and incorporated herein are exhibits more particularly setting forth in detail the itemizations that hereinafter follow:

(1) TCO-BOC Hearings, September, 1977 (Exhibit A-I)

Mileage at 15 cents/mile-240		$ 36.00	
Copies Memorandum on Constitutional Law, Transcript and Proposed Findings at 10 cents		31.94	
Special Witness Fees On Eagles:			
Dr. Manuwal	$ 150.00		
J. Howton	247.47		
J. Howton	398.88		
Dr. Fleming	391.00		
	$1,187.35	$ 1,187.35	
			$ 1,255.29

(2) Review and mandamus Proceedings (Exhibit A-II)

Mileage at 15 cents/mile-1,040		$ 156.00	
Copies - 3,564		356.00	
Telephone		410.13	
Service of Papers-Thorsen		25.00	
		$ 947.53	
			$ 947.53

(3) SHB Hearing - 1977-1978
(Exhibit A-III)

Mileage at 15 cents/mile-240		$ 36.00	
Copies - 640		64.00	
Lodging - Attorney		128.62	
Telegram		28.00	
Witness Fees			
Anderson	$ 132.00		
Fleming	856.75		
Howton	425.00	$ 1,413.75	
Reporter Fees:			
Anderson	83.25		
Fleming & Pallis	124.00	207.25	
			$ 1,877.62

(4) THURSTON COUNTY BOC
HEARINGS April, 1978
(Exhibit A-IV)

Mileage at 15 cents/mile-120	$ 18.00	
Copies - 1,420	142.00	
	$	160.00

3.5 Attorneys Services (See Exhibit A-I, II, III and IV)

September, 1977, TCO-BOC		
28 hours at $60.00/hour	$ 1,680.00	
Review and Mandamus Proceedings		
9-26-77 - 9-19-78		
351 hours at $60.00/hour	21,060.00	
SHB - 10-6-77 - 2-17-78		
127 hours at $60.00/hour	7,620.00	
TCO-BCO Hearing After SHB		
Decision - 1978		
24 hours at $60.00/hour	1,440.00	
		$31,800.00

3.6 Increased Costs From September, 1977 to October, 1978 - For Improvements To Land At 15% Increase x $75,000.00 Caused by Delay	$11,250.00	
3.7 Lease Payments DNR, One Year	3,120.00	
3.8 Excise Tax on Lease Payment at 12%	374.40	
3.9 Consulting and Witness Fees and Reimbursable Expenses - George Pallis (estimated and will more fully be set forth by trial amendment)	10,000.00	
	$24,744.40	
		$ 24,744.40
TOTAL DAMAGES AS SET FORTH IN #3. HEREOF:		$102,280.84

IV.

FUTURE DAMAGES AND EXPENSES

The Petitioner believes, because of the past record of the Respondents herein, there will be further damages incurred by actions of the Respondents and Intervenor-Respondents. The actions of the Respondents directly caused the Intervenor-Respondents to employ an attorney herein and subjecting the Petitioner to further damages for delay, expenses, and attorney's fees.

It is now contemplated by the Petitioner that any one of the following may occur causing further damages to the Petitioner:

1. Respondents issue permits and appeal this action, requiring the Petitioner to mitigate

damages by commencing construction and on commencing construction being stayed by proceedings of either the Respondents or Intervenor-Respondents, and suffering damages caused by such actions, or;

2. Respondents failing to issue permits and appealing this action, requiring the Petitioner to commence improvements without permit until stayed, causing further damages, or;

3. Respondents issue permits and not appeal this action, terminating the loss of Petitioner so far as failure to issue permits but then causing the Petitioner to be subject to appeal and stay of proceedings as claimed by Intervenor-Respondents.

It is therefore prayed that following the hearing for damages herein the Court reserve jurisdiction for the following:

1. To assess further damages not accounted for herein;

2. Assess damages for attorney's fees and costs for the Petitioner in event of appeal.

It is further made known to the Court that the Court has the power in its discretion to award damages herein as a matter of equity and maintain jurisdiction of this case pending appeal and depending upon the result thereof.

V.

JURISDICTION OF THE COURT FOR AWARD OF DAMAGES ABOVE-STATED

The Petitioner makes known to the Court that the actions herein for mandamus and writ of review are special actions for equitable relief. The Petitioner is entitled to award for damages, expenses and reasonable attorney's fees based upon the following authority:

1. As a matter of law for constitutional violation of rights of the Petitioner;

2. Unlawful action causing tort damages;

3. Mandamus proceedings providing relief as set forth in RCW 7.16.260 reading as follows:

> "Judgment for damages and costs--Peremptory mandate. If judgment be given for the applicant he may recover the damages which he has sustained, as found by the jury or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay."

4. Damages for violation of Shoreline Management Act, RCW 90.58.230:

> "VIOLATORS LIABLE FOR DAMAGES RESULTING FROM VIOLATION--ATTORNEY'S FEES AND COSTS. Any person subject to the regulatory program of this chapter who violates any provision of this chapter . . . . shall be liable for all damage to . . . . private property arising from such violation . . . . In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party."

WHEREFORE Petitioner prays for relief against each of the Respondents, jointly and/or individually, as follows:

1. Award of damages in the sum of $102,280.84 that includes reasonable attorney's fees as stated herein;

2. An order reserving jurisdiction for further award of damages to the Petitioner including an award of reasonable attorney's fees for appellate proceedings that may hereinafter follow. Brandt v. Impero, et al, 1 Wn. app 678, 463 P.2d (1969).

3. Costs and such further relief that Court may determine in its discretion.

DATED this 26th day of September, 1978.

s/
Philip P. Malone
Attorney for Petitioner,
Lake Lawrence, Inc.

FILED:
9/28/1978

APPENDIX A - RECORD
SUPERIOR COURT - APPELLANT'S NOTICE OF APPEAL
TO CIRCUIT COURT OF APPEALS, 9/28/1978

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, et al, Petitioners, vs. THURSTON COUNTY, et al, Respondents, ROY HARRISON, et al, Intervenors.	Consolidated Causes Cause No. 58623 Cause No. 59975 NOTICE OF APPEAL R.A.P. 5.3

TO: State of Washington Department of Natural Resources and J. Lawrence Coniff, their attorney; Lake Lawrence, Inc. and Philip P. Malone, its attorney; Petitioners.

TO: Roy Harrison, et al, and Thomas H.S. Brucker, their attorney, Intervenors.

1. Parties Seeking Review:

Thurston County; Commissioner George Barner, Jr., Commissioner Del Pettit, Commissioner Marj Yung; Board of Thurston County Commissioners, Respondents herein, as commissioners and individuals.

2. Decision to be Reviewed:

Findings of Fact, Conclusions of Law and Adjudication pursuant to writs of mandamus and certiorari signed by Judge Richard Pitt and entered in the Thurston County Clerk's Office Monday, September 25, 1978.

3. Name of the Appellate Court to which Review is Taken:

Court of Appeals, Division II, Tacoma, Washington.

s/
ALEXANDER W. MACKIE
Owens, Weaver, Davies & Dominick
Attorneys for Respondents

FILED:
9/28/1978

APPENDIX A - RECORD
SUPERIOR COURT - 9/28/1978 APPELLEE'S SUPERSEDEAS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, et al, Petitioners, vs. THURSTON COUNTY, et al, Respondents, ROY HARRISON, et al, Intervenors.	Consolidated Causes Cause No. 58623 Cause No. 59975 NOTICE OF SUPERSEDEAS R.A.P. 8.1(c)

TO: State of Washington Department of Natural Resources and J. Lawrence Coniff, their attorney; Lake Lawrence, Inc. and Philip P. Malone, its attorney; Petitioners.

TO: Roy Harrison, et al, and Thomas H.S. Brucker, their attorney, Intervenors.

Thurston County, Commissioner Marj Yung, Commissioner Del Pettit, Commissioner George Barner, Jr., Board of Thurston County Commissioners, Respondents herein, do hereby submit this Notice of Supersedeas against the Findings of Fact, Conclusions of Law and Adjudication pursuant to writs of mandamus and certiorari signed by Judge Richard L. Pitt and entered in Thurston County

Clerk's Office on Monday, September 25, 1978 directing said Respondents to approve the subdivision and development of certain property located in Thurston County.

s/
ALEXANDER W. MACKIE
Owens, Weaver, Davies & Dominick
Attorneys for Respondents

APPENDIX A - RECORD

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT, and MARJ YUNG, constituting the Board of Thurston County Commissioners and as individuals, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, LAKE LAWRENCE, INC., Respondents.	NO. 3662-II ORDER TEMPORARILY STAYING PROCEEDINGS AND FIXING A HEARING

This matter came before the undersigned on an emergency motion filed by the appellants in the above referenced cause. After hearing argument from the parties and reviewing the materials submitted in support of the motion, it appears that several of the issues raised by this case warrant consideration of a full panel of this court. Accordingly, it is

ORDERED that this matter is placed upon the court's docket for a hearing to be held October 12, 1978, at 10:30 a.m. It is further

ORDERED that the parties shall, in accordance with the schedule set out below, brief and be prepared to argue the following issues:

(A) In view of RCW 2.06.030(c) does this court properly have jurisdiction to hear the appeal in the above referenced matter?

(B) If this court does have jurisdiction, is this a proper case to be certified to the Washington State Supreme Court?

(C) Did the Superior Court have authority to enter the order appealed from against the County Commissioners in their status as individuals as opposed to their official status?

(D) Is the order of the trial court appealable?

(E) Is it proper for this court to stay all proceedings or any part of the proceedings in the trial court, including a contemplated trial on an issue of damages, pending final resolution of this appeal by this court?

(F) If a stay is entered, should the individual Thurston County Commissioners be required to post a bond and, if such a requirement is imposed, what should be the amount of the bond?

(G) Should the respondents, or any of them, be awarded counsel fees because of the short notice received on the hearing of this motion?

It is further

ORDERED that, pursuant to RAP 7.3, all proceedings in the Superior Court in this matter are stayed pending the hearing to be held on October 12, 1978, or until further order of this court. No bond shall be required as a condition of this stay. Notwithstanding this stay, the trial court may, if it so elects, fix a trial date for the trial of the damage action arising out of this litigation but shall take no other or further action in this case during the pendency of the stay provided for in this paragraph. It is further

ORDERED that the appellants shall have until 4:30 p.m. on Thursday, October 5, 1978, to serve and file with this court any supplementary material for the record or any supplemental briefing which appellants may wish the court to consider and the respondent shall have until 4:30 p.m. on Tuesday, October 10, 1978, to serve and file with this court any supplementary material it may wish to add to the record on review and any briefs which it wishes the court to consider.

DATED this 29th of September, 1978.

s/
Certificate of the Clerk of the Court of the State of Washington, Division II, at Tacoma, Washington. The above is a true and correct copy of the original instrument which is on file or of record in this court. Done this 29th day of September, 1978.

s/
Clerk

s/
Deputy

cc: Alexander W. Mackie
J. Lawrence Coniff, Jr.
Philip P. Malone
Thurston County Clerk

APPENDIX A - RECORD

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC., Respondents,	NO. 3662-II
v.	ORDER OF CERTIFICATION AND STAY ORDER
THURSTON COUNTY, GEORGE BARNER, JR., DEL PETTIT, and MARJ YUNG, constituting the Board of Thurston County Commissioners and as individuals, Appellants,	
v.	
LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK.	

This appeal from an order of the Superior Court directing the Thurston County Commissioners, collectively and individually, to approve a preliminary platt [sic] and issue a substantial Developmental permit faces at least two issues of broad public importance which have not, to date, been authoritatively determined. The first of these two issues is whether a Board of County Commissioners may impose more stringent environmental restrictions than those placed on a project by the State Shoreline Hearings Board. The issue of the relationship of permit granting agencies under the

State Environmental Policy Act is one which has not yet been authoritatively determined and potentially affects all permit issuing municipalities. A second issue of broad public impact is whether the trial court's determination, in the present case, that RCW 58.17.110 is unconstitutionally vague is correct.

[illegible] and determined, before a hearing on the merits, that these issues raised in this appeal are fundamental and of broad public import and are, therefore, appropriate for disposition by the Supreme Court pursuant to RCW 2.06.030 and RAP 4.2. This court has also determined, however, that certain temporary relief is required during the pendency of this appeal. Accordingly, it is

ORDERED that this case is certified to the Supreme Court for such determination as that court may deem appropriate. It is further

ORDERED that pending further order of this court of of the Supreme Court, as appropriate, all further attempts to enforce the judgment in this matter against Thurston County, against the Thurston County Commissioners in their official capacity or against the Thurston County Commissioners in their individual capacity is stayed. No bond shall be required of the Thurston County Commissioners, in their individual capacity, because the court, without deciding the issue on the merits, has determined that there is a substantial question whether the trial court had the jurisdiction to require the County Commissioners, in their individual capacities, to perform the acts required by the decree in this cause. It is further

ORDERED that the order from which the review is being sought is, pursuant to RAP 2.2, an appealable order. It is further

ORDERED that all requests by any of the parties or awards of attorney's fees will abide the ultimate determination of this cause. It is further

ORDERED that notwithstanding the stay set forth in this order, the parties may prepare for trial the damage action which is a part of this proceeding but may not bring that damage action on for trial until such time as this case has been resolved on appeal.

s/
CHIEF JUDGE

WE CONCUR:

s/

s/

cc: Alexander Mackie
Joseph L. Coniff
Philip Malone
Roger Leed
Charles B. Roe, Jr.
Robert Jensen

APPENDIX A - RECORD

SUPREME CT. - APPELLANT'S MOTION & MEMO. FOR DISCRETIONARY REVIEW - OF CT. OF A. - JURISDICTION, STAY, ETC.

NO. 3662-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC., Respondents

v.

THURSTON COUNTY; THE BOARD OF THURSTON COUNTY COMMISSIONERS; COMMISSIONER MARJ YUNG; COMMISSIONER GEORGE BARNER, JR.; COMMISSIONER DEL PETIT, Appellants

v.

LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK, Intervening Appellants

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MOTION FOR DISCRETIONARY REVIEW

Philip P. Malone, Attorney for
Lake Lawrence, Inc.
P.O. Box 443
Poulsbo, Washington 98370
Phone: (206) 779-5518

A. IDENTITY OF PETITIONER.

Lake Lawrence, Inc., one of the Respondents, asks this Court to accept review of the decision of

October 12, 1978 entered October 13, 1978 in the Circuit Court of Appeals entitled: Order of Certification And Stay Order.

B. DECISION.

On October 13, 1978, the Court of Appeals denied a motion of the Respondent to dismiss the appeals of the Appellants and Intervening Appellants and entered Order of Certification And Stay Order wherein there is certified to this Court pursuant to RCW 2.06.030 and RAP 4.2, as a matter of "broad public importance" two issues:

> (1) "The first of these two issues is whether a Board of County Commissioners may impose more stringent environmental restrictions than those placed on a project by the State Shorelines Hearings Board . . ."
>
> (2) "A second issue of broad public impact is whether the trial court's determination, in the present case, that RCW 58.17.110 is unconstitutionally vague is correct."

It determined that the trial court's order of September 25, 1978 was an appealable order as a matter of right and stayed without bond pending trial of the trial court as to remaining issues of liability and damages. It denied compensatory damages in the way of attorney's fees and costs of the Respondent to abide the ultimate determination of the case.

As part of the motion in the Appendix hereof are copies of following documents of record in the Court of Appeals:

Appendix & Pages	Item
A 1 thru 1.	Thurston County Superior Court, Adjudication Pursuant To Writs of Mandamus and Certiorari, September 25, 1978.
A 2 thru 6.	Thurston County Superior Court, Findings of Fact and Conclusions of Law, September 25, 1978.
A 7 thru 18.	Thurston County Superior Court Attachment of Shorelines Hearings Board (SHB No. 77037) Final Findings of Fact, Conclusions of Law and Order of March 13, 1978 to above.
A 19 thru 25.	Court of Appeals - 3662-II: Motion For Emergency Stay Order-(and Affidavit) RAP 8.3, RAP 17.4(b), Appellants.
A 26 thru 27.	Court of Appeals - 3662-II: Motion For Dismissal In Response To Respondents Motion And Motion For Compensatory Damages And Attorney's Fees And Expenses By Lake Lawrence, Inc.
A 28 thru 29.	Court of Appeals - 3662-II: Affidavit In Support Of Motion For Dismissal In Response To Respondents Motion And Motion For Compensatory Damages And Attorney's Fees And Expenses By Lake Lawrence, Inc.

Appendix & Pages	Item
A 30 thru 32.	Court of Appeals - 3662-II: Order of Certification And Stay Order Entered October 13, 1978.

C. ISSUES PRESENTED FOR REVIEW.

Issue Number One:

Is the Superior Court order of Thurston County entered September 25, 1978, resolving a stipulated issue between the parties in favor of the Respondents, an appealable order as a matter of right under RAP 2.2 whereby the Court of Appeals acquired appellate jurisdiction to stay the mandate of the Superior Court order to the Appellants and trial of further pending issues of liability and damages against the Appellants, when that order appealed from reserved jurisdiction in the Superior Court over those matters. A 1 thru 1.

Issue Number Two:

Did the Circuit Court of Appeals have jurisdiction to certify issues to the Supreme Court different from and contrary to the issue stipulated between the parties and decided by the Superior Court order from which the Appellants appealed pursuant to RCW 2.06.030 and RAP 4.2.

D. STATEMENT OF CASE.

1. January, 1977. Respondent, Lake Lawrence, Inc. applied with Thurston County for: (1) Preliminary Plat approval of a 29 lot subdivision of approximately 14 acres on Lake Lawrence in Thurston County pursuant to the Platting Statute RCW 58; (2) A substantial Development Permit pursuant to the Shoreline Management Act of 1971 (SMA-RCW 90.58),

and in conformance with use regulations with an allowable use of the site for residential purposes having been regulated and environmentally zoned "Rural Environment" by Thurston County Shoreline Master Program (SMP adopted pursuant to SMA). The Respondents also applied for a variance for construction of a private community dock on the shoreline of the property. The SMP of Thurston County regulates the use of property to protect the environment into 4 designated classifications: "Rural", "Urban", "Natural" and "Conservancy". The first two classifications contain no restrictions on the use of the property for the protection of wild life; the other classifications do. The Thurston County Master Program is a legislative statement of policy only and not a regulation - antedating the SMP.

2. February, 1977. After the first public hearing of Thurston County Planning Commission, a threshold determination was made by Thurston County as the "lead agency" pursuant to the State Environmental Protection Act (SEPA) requiring the Respondent to prepare and submit a Draft Environmental Impact Statement (DEIS), paying particular attention to use of the site by eagles.

3. April, 1977. The Respondent hired experts in the field of environment and the DEIS was submitted, registered and circulated to public agencies and made available to the public. The Department of Ecology (DOE) found no objection. In accordance with SEPA time for comment by public agencies expired on or about May 18, 1977.

4. May, 1977. The Thurston County Planning Department completed its Final Environmental Impact Statement (FEIS).

5. June and July, 1977. Thurston County Planning Commission held hearings resulting in no recommendation. The Thurston County Planning Department, after time for comment by public agencies had expired, ignored the procedural requirements of SEPA and invited comment on the subdivision from

the State of Washington Game Department and the United States Fish & Wildlife Service that had already made comment to the DEIS in the FEIS.

By instigating new comments the Thurston County Planning Department recommended denial of the applications applied for by the Respondent and recommended rezoning the site to "Conservancy" or "Natural". The Thurston County Planning Commission made no recommendation on the matter to the Appellants.

6. August and September, 1977. The Appellants held two public hearings and on September 28, 1977, arrived at their decision following the latest Thurston County Planning Department recommendation. Prior to such hearings the Respondent had submitted lengthy proposed findings that were ignored. It also submitted a memorandum as to the law and the constitutional restrictions against the proposed recommendation of the Thurston County Planning Department. The Appellants ignored them. The Appellants decision is set forth in two letters, A 33 thru 34.

7. October, 1977. The State of Washington through DNR joined with the Respondent and filed a Petition For Writs of Review and Prohibition against the Appellants and secured an order to show cause for the 14th of November, 1977 before Judge Henry of the Thurston County Superior Court in Cause No. 58623 (review).

8. November, 1977. Judge Henry granted writ of review calling for special setting of hearing on April 17, 1978. A writ of prohibition was also granted preventing the Respondents from rezoning environmentally the property.

9. February 14, 15, 16 and 17, 1978. Hearings were held before the Shorelines Hearings Board (SHB). The total proposal submitted for review by the SHB was the same as that submitted to the Appellants and included the Preliminary Plat.

10. March 23, 1978. The SHB entered its findings and conclusions finding that the proposed development was consistent with SMA and the Thurston

County SMP and among other findings found that Lake Lawrence is not a primary feeding area for eagles, but that: "it is nonetheless an 'incidental' perching area for eagles", and that the setting aside of three waterfront lots and a buffer area in the preliminary plat for an "eagle preserve" provides adequate protection against significant adverse effect to the eagles. A 15 thru 15. 11. April, 1978. Time for appeal from SHB decision expired and the Appellants elected to rely on their interpretation of their authority to deny the Preliminary Plat as a matter of "public interest" as a factor for the environmental protection of eagles under RCW 58.17.110 which contained no factor for environmental consideration of wild life. Subsequent hearings were held by the Appellants determining that the SHB decision was "moot", denying approval of the Preliminary Plat and issuance of a Substantial Development Permit, and for the first time (15 months from time of application) acted on the variance application of the community dock and denied that application - necessitating proceedings on that decision that are now separately before the SHB. The Respondent filed a Notice of Trial Amendment notifying the Appellants in the review action (58623) of presenting the findings of the SHB and portions of the record for trial scheduled on April 17, 1978 thru April 20, 1978. See latest motion of Respondent thereon before SHB. A 35 thru 37.

12. May, 1978. The trial having been continued, the Appellants caused new public hearings to be held by them after decision by the SHB and added their new findings to the record in the review action 58623 over the objection of the Respondents. The State of Washington, DNR, and the Respondents instituted a separate action for a Writ of Mandamus and Damages in Cause No. 59975.

On May 22, 1978, Judge Henry allowed the intervention of the Intervening-Respondents (Intervening-Appellants). An Amended Writ of Certiorari was granted setting hearing before visiting Judge

Pitt on July 6, 1978. Intervening Appellants are members of a class owning adjacent property also in the same "Rural Environment" designation as the Respondents but enjoying use of their land for single family residences.

13. July 6, 1978. Judge Henry in the mandamus proceedings stayed entry of final order and judgment in the mandamus proceedings (59975) and consolidated hearings therein with review proceedings before Judge Pitt.

14. July 6, 1978. The parties entered a Stipulation and Order On Issues Under Review. A 38 thru 41. That stipulation and agreement provided between the parties for a damage hearing, in paragraph 3 thereof, in the event a decision was made by the trial court in favor of the Respondent as provided in Paragraph 1 thereof. The Respondent claims that such decision was made in favor of Respondent and by agreement and the actions for stay of these proceedings on appeal herein the Appellants and Intervenor-Appellants are in breach of that stipulation and agreement.

15. September 21, 1978. Judge Pitt signed a: "Adjudication Pursuant To Writs of Mandamus And Certiorari" and "Findings and Conclusions Of Law". A 1 thru 6. A previous memorandum opinion of Judge Pitt has been submitted to the Court.

16. September 26, 1978. The Respondent filed and served on the Appellants and Intervenor-Appellants an Amended Petition For Damages By Lake Lawrence, Inc., setting forth as cause for damages SMA; Platting Statute RCW 58 et al; SEPA; the 5th and 14th Amendment of the United States Constitution and a Violation of the Constitution of the State of Washington, Article II, Section 11. A 42 thru 53.

17. On September 28, 1978, the Appellants filed a Notice of Appeal in the Superior Court of Thurston County. A 54 thru 54. On October 5, 1978, the Intervening Appellants filed a Notice of Appeal in the Superior Court of Thurston County, in the Circuit Court of Appeals. A 55 thru 55. That at approximately 11:00 a.m. on September 28, 1978,

attorney for Appellants notified Respondent's attorney of a notice of appeal being filed and of an emergency hearing to be held before Judge Pearson of the Circuit Court of Appeals. That evening the Respondent's attorney was served by the Appellant's attorney with copies of a Motion For Emergency Stay Order - RAP 8.3, RAP 17.4(b), A 19 thru 25, and a Notice of Supersedeas, A 56 thru 56. On September 29, 1978, a hearing was held in the Circuit Court of Appeals and an order was entered thereon. A 57 thru 58. Hearing pursuant to said order was held on October 12, 1978, and the order dated October 13, 1978, from which this appeal is taken, has been entered. A 30 thru 32.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Relief should be granted by the Court pursuant to its powers under RAP 17.1 and discretionary review should be accepted in that in accordance with RAP 13.5(b) the Court of Appeals has: (1) . . . . "committed an obvious error which would render further proceedings useless", or (2) " . . . . committed probable error and the decision of the Court substantially alters the status quo or substantially limits the freedom of a party to act . . . . "

ARGUMENT

Issue Number One. The Appellants do not have "as a matter of right" to appeal from an interlocutory order of the Thurston County Superior Court entered by it on September 25, 1978 entitled: Adjudication Pursuant To Writs Of Mandamus And Certiorari" wherein was reserved to Superior Court jurisdiction a: ". . . . later hearing any issues of the Respondents (Appellants herein) liability for damages to plaintiff and the amount thereof." A 1 thru 1.

The only decisions of a trial court subject to a right of appeal are stated in RAP 2.2. The

adjudication by the trial court with the reservation of jurisdiction stated in it obviously was not a "Final Judgment" as provided in RAP 2.2(1). Nor was it a judgment as defined in the companion rule as defined in CR 54(a)(1), which contains the identical language of RCW 4.56.010 which that rule superseded. Such an order was not an appealable order in State of Washington v. The City of Bremerton, 33 Wn.(2d) 321, 205 P.(2d) 1212, (1930), where this Court held that where findings have been entered and a peremptory writ of mandamus issued by the trial court without a formal judgment being entered by the trial court, such writ cannot be appealed. 52 Am Jur. 2d Sec. 491, P. 812.

The issue of whether the Appellants had statutory and lawful authority without violation of constitutional provisions to deny approval of the Preliminary Plat and deny issuance of a Substantial Development Permit was stipulated between the parties, and the Superior Court's decision related to that issue was by the content of that stipulation and a decision on that issue in favor of the Respondent agreed upon not to be a final determination of all the issues of liability and damages between the parties. A 38 thru 41.

The adjudication order of the Thurston County Superior Court was not an appealable decision as a matter of right was defined in RAP 2.2(3) as a Decision Determining Action. As defined, it must be a decision " . . . . which in effect determines the action and prevents a final judgment or discontinues the action", which are conditions to a right of appeal that are not satisfied by the trial court's decision in this action.

The trial court's order on September 25, 1978, was not a final judgment in an action involving multiple parties and multiple claims in accordance with CR 54(b) and its companion RAP 2.2(c). The

trial court by entry of its adjudication order did not direct the entry of a judgment as to the one claim of issue between the parties that the trial court decided and made no finding that there was no just reason for delay to warrant an appeal as provided in those rules. RAP 2.2(c) specifically provides that without and in the absence of such pronouncement by the trial court the issue was subject to discretionary review only.

Clearly the consolidated actions in trial court, review of actions and non actions of the Appellants and mandamus proceedings, involved a multiple action that remain consolidated on review. RAP 3.3(a). There remains for trial court litigation the miltiple [sic] issues of liability for separate actions and non actions of the Appellants occuring [sic] at different times and multiple issue of damages related to such actions and non actions on various theories of liability. (See A 43 thru 47.) Such issues of liability were raised not only in the petition for review but also were stipulated for hearing between the parties and reserved for hearing by the trial court's decision.

It has been argued by the Appellant that Gazin v. Hieber, 8 Wn. App. 104, 504 P.2d 1178 (1978) in a case involving multiple claims or theories of liability arising out of one action applies to this matter. Similar cases argued by the Respondents are not in order. Clearly in point in multiple claims and parties cases where all issues have not been settled are Rhodes v. D & D Enterprises, Inc., 16 Wn. App. 175, 554 P. (2d) 390 (1976); Surrey Downs v. Bellevue, 14 Wn. App. 801, 545 P.2d 24 (1976); Snyder v. State, 19 Wn. App. 631 (1978).

The result of the Court of Appeals order of October 13, 1978, denies to the Respondent a complete and fair trial by the trial court as to all issues of liability and damages in that appeal is premature and prempts the jurisdiction of the trial court by appellate jurisdiction and denies access of the trial court to the record on review. The entry of stay orders in effect sbustitute [sic] findings of fact of the trial court that the Appellants from the record on review did not as a matter of fact act with lawful and constitutional authority to deny the issuance of a substantial development permit and approval of a Preliminary Plat. Such stay of the trial court's order and further proceedings are contrary to authority of the appellate court as held in State Ex Rel. Neuert v. Alderwood, 1 Wn. App. 480, 462 P.2d 948, Div. 1 (1969) and Kirk v. Allemann, 2 Wn. App. 183, 467 P.2d s19, Div. III (1970).

While the record is on appeal in this matter only in piecemeal litigation before the trial court and piecemeal appeal before this Court. Curtis v. Interlake Realty, Inc., 62 Wn.(2d) 928, 385 P.(2d) 37 (1963).

ARGUMENT

Issue Number Two. The issues credited to this Court by the order of the Circuit Court of Appeals of "broad public importance" are not the issues decided by the trial court in its findings of fact and conclusions of law. The Court of Appeals perceived one issue to be as to whether: ". . . . a Board of County Commissioners may impose more stringent environmental restrictions than those placed on a project by the State Shorelines Hearings Board." The importance of that issue to the Court of Appeals was stated as being an issue: " . . . . of the relationship of permit granting agencies under the State Environmental Policy Act

is one which has not yet been authoratively determined and potentially affects all permit issuing municipalities."

Whereas, the issue formulated by the stipulation of the parties and decided by the trial court reads:

> "The parties hereto do stipulate as follows:
> (1) The parties agree there is one issue of law for the Court to consider; that is whether Respondents, on April 24, 1978 and thereafter, on deciding not to appeal the Shorelines Hearings Board judgment, had constitutional and legislative authority to do the following:
>
> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle habitat) having already presented to the Shorelines Hearings Board;
>
> (b) Make a decision on the record before the Shorelines Hearings Board and the evidence at new public hearings contrary to and in conflict with the prior Shorelines Hearings Board judgment on the same matter;
>
> (c) Enter Findings of Fact, Conclusions of Law, and Judgment contrary to and in conflict with the Shorelines Hearings Board judgment of March 23, 1978." A 38 thru 39.

Thus the stipulated issue before the trial court was not related to the State Environmental Protection Act (SEPA) as to the issuance of permits. SEPA contains no administrative provisions for the issuance of permits of any kind but only mandates that environmental considerations be taken

into account in the decision making process. In this matter the Respondent fully complied with that act and Thurston County as "lead agency" and an act of itself, circulated, published and registered in accordance with SEPA a Draft Environmental Impact Statemand a Final Environmental Impact Statement (DEIS and FEIS), which the Respondents claim the Appellants ignored in their decision making process as a separate issue and cause of liability for damages that has not been decided by the trial court. (See: Stipulation Paragraph 3, A 39 thru 39 and Amended Petition For Damages, A 42 thru 53.)

The findings and conclusions of the trial court decided the stipulated issue of the parties before it. The issue formulated by the Court of Appeals ignores the findings of fact of the actions and non actions of the Appellants prior to the decision of the Shorelines Hearings Board. (Appendix, Findings of Fact 2.1 thru 2.7, A 3 thru 4) and misconceives that the issue was whether the Appellants can impose more "stringent environmental restrictions than those placed on a project by the Shorelines Hearings Board". This is not the fact. First, the Shorelines Hearings Board did not impose any restrictions on the project. It reviewed the same total record that was before the Appellants and imposed no new restrictions that were not contained in the total proposal of the Respondent that were before the Appellants. The Shorelines Hearings Board then found that:

"IV

> The proposed substantial development (without the community dock) is consistent with the general policy of the master program and the provisions of chapter 90.58 RCW." (Shoreline Management Act- SMA)
>
> "A permit for the project, as described herein and when conditioned as provided for

in Conclusion of Law III, will be consistent with the master program of Thurston County and the provisions of the Shoreline Management Act."

The decision of the SHB of March 23, 1978 was not appealed by the Appellants.

Second, the Appellants prior to the SHB decision of March 23, 1978, did not impose "more stringent environmental restrictions" on the project. In fact prior to the SHB decision as found by the trial court in its findings the Appellants attempted to rezone the property. (See Appendix Findings of Fact 2.3, A 3 thru 3) and Appellants Decision of September 28, 1977, A 33 thru 34.)

After the decision of the SHB the Appellants failed to appeal and the trial court on review incorporated the decision of the SHB in its findings. Appendix Conclusions of Law 3.1, A 4 thru 5.

It is therefore clear from the record that the issue formulated by the Court of Appeals for certification to this court is not the issue decided by the trial court; it ignores the findings of fact of the trial court and leaves an impression that the issue is a question only of degree of power of the Appellants to impose restrictions by denying Preliminary Plat approval as a matter under the State Environmental Protection Act, when in fact the Appellants denied all use of the property to the Respondents both before and after the SHB decision, contrary to and in violation of SEPA, the Platting Statute RCW 58, the authority of the SHB, the Shoreline Management Act and constitutional restrictions as set forth in the pleadings of the Respondents and not yet decided by the trial court. (See: A 42 thru 53.) The Respondent contends that the record shows that the issue is not a degree of

the authority of the Appellants, but a question of total lack of authority of the Appellants under a number of laws and constitutional restrictions.

The Court of Appeals finding in its Order of Certification And Stay Order of October 13, 1978, wherein it finds: "A second issue of broad public impact is whether the trial court's determination, in the present case, that RCW 58.17.110 is unconstitutionally vague is correct", is in error. It is obvious and clear from a reading of the issue as contained in the stipulation that such was not an issue before the trial court. A 38 thru 41.

The Appellants contend that their authority under RCW 58.17.110 wherein the general term "public interest" is stated together with a listing of specific factors in that statute, grants local government authority to deny a preliminary plat as a matter of "public interest", without considering that such authority is limited by the other factors stated in RCW 58.17.110 that do not include as a factor environmental considerations for the denial of approval of a preliminary plat for the development of the site by the Respondents. The statute does not list as a factor such ground for rejection of approval of a preliminary plat and the purpose section of that statute does not list the protection of wild life as a purpose of the platting statute, RCW 58.17.010. The Appellants argues that such authority under "public interest" as a sole factor for their authority in denying approval of a preliminary plat under RCW 58.17.110 was also authority for the Shorelines Hearings Board not having jurisdiction to hear the matter. See findings of SHB A 8 thru 8. Such argument was rejected by the AHB A 9 thru 9. After decision of the SHB and Appellants further have argued that such statutory power under RCW 58.17.110 gave the Appellants to render the decision of the SHB "moot" by holding new hearings on the same ground and entering new findings of fact. The trial court in

its findings did not find that RCS 58.17.110 was vague and unconstitutional, but that the interpretation and application of the Appellants relying solely on the words "public interest" without considering the other factors listed in that statute as limiting their authority would render that statute unconstitutional and such interpretation would render portions of the factors listed in RCW 58.17.110 meaningless and contrary to the purpose clause and intent of the statute.

It is argued that rather this case is one more of "broad private importance" than "broad public importance" and that even if the Court of Appeals had jurisdiction it is not a matter to be certified to this Court until the trial court has finally determined all the issues of the case. The issues of liability and damages for various actions and non actions of the Appellants are still pending. The mandate of the trial court ordering the Appellants to issue a substantial development permit and approval of the preliminary plat (after approximately one year of administrative hearings before Thurston County and one year of litigation in review before the SHB and the trial court) will not render the one legal issue "moot" as a matter of law of the issue to be decided on appeal as a "issue of broad public importance" for that issue can be decided on appeal after final judgment in the trial court as to all issues of liability and damages. It is the Appellants interpretation of their authority as unbridled by RCW 58, SEPA, SMA and constitutional provisions that seemingly makes this case one of public importance and not the status of the law.

Nor will the granting of a substantial development permit and approval of the preliminary plat render "moot" an appeal as a matter of fact. The Respondent is not in a position to destroy the habitat of the "perching eagles" on the site by

cutting all trees and salting the earth from which they grow. Instead the proposal as a matter of fact confirmed by the decision of the SHB and the adoption of that decision by the trial court on a full review of the record finds differently in that the total proposal of the Respondent has conditions in the setting aside of three waterfront lots free from human disturbance, the creation of buffer areas, and the downward limitation in the residential density use of the property. The Court of Appeals by its stay order of the mandate of the Superior Court ignored those findings and has further delayed the Respondents and protected the Appellants from their unlawful action determined by the trial court on full review of the record. It has denied to the Respondent a complete trial in the foreseeable future on the issue of its property being taken for public purpose without just compensation, and any use of that property in the interim. Instead of appellate jurisdiction being used as shield to maintain the status quo it is being used as a sword against the Respondent.

It is therefore argued that the Circuit Court of Appeals in having formulated issues of its own contrary to the findings of fact and conclusions of law of the trial court is certifying to this Court issues that were not in issue before the trial court and therefore were not cases for certification within the meaning of RCW 2.06.030 or RAP 4.2.

By posing new issues for certification to this Court that were not before the trial court it has denied to the Respondent and the trial court prematurely to have all issues heard. "The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before this court can consider it on appeal". Bellevue School Dist. v. Lee, 70 Wn. (2d) at page 950, 425 P. (2d) 902 (1967).

CONCLUSION

The Court of Appeals order of October 13, 1978 is in obvious error:

1. The order of the trial court reserving jurisdiction over the mandate to the Appellants ordering the issuance of approval of a preliminary plat and a substantial development permit and reserving jurisdiction to determine the liabilities and damages of the Appellants for their unlawful actions was not an appealable order as a matter of right in accordance with CR 54 and RAP 2.2 and therefore the Court of Appeals acquired no jurisdiction to enter the order that it did on October 13, 1978, in violation of those rules.

2. The findings of fact and conclusions of law by the trial court did not resolve the issues formulated by the Court of Appeals in its order of October 13, 1978, as a matter for certification of broad public importance to this Court. The stay of proceedings in trial court is an usurpation of judicial powers of a Supreme Court and of the rights of the Respondent to timely have heard all issues of liability and damages as reserved by the jurisdiction of the trial court in its order when the Court of Appeals made no finding that the order of the trial court was in obvious or probable error to warrant appeal and stay proceedings of the trial court on the case.

3. The Respondent has incurred and probably will continue to incur damages by way of attorney's fees and costs by the extraordinary procedure taken by the Appellants contrary to CR 54 and RAP 2.2 in this matter to delay the mandate of the order of the Superior Court.

Wherefore the Respondent respectfully requests a timely hearing on this matter and an order dismissing the appeals of the Appellants and Intervening Appellants herein with a provision for award of compensatory damages to be determined as provided in RAP 18.9(a) and RAP 18.1.

Respectfully submitted,

s/
Philip P. Malone
Attorney for Respondent
Lake Lawrence, Inc.

NO. 3662-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC., Respondents

v.

THURSTON COUNTY; THE BOARD OF THURSTON COUNTY COMMISSIONERS; COMMISSIONER MARJ YUNG; COMMISSIONER GEORGE BARNER, JR.; COMMISSIONER DEL PETIT, Appellants

v.

LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK, Intervening Appellants

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MEMORANDUM OF ARGUMENT OF LAKE LAWRENCE, INC. ON HEARING BEFORE THE SUPREME COURT ON MOTION FOR DISCRETIONARY REVIEW

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This Memorandum is filed of the oral argument by Philip P. Malone, attorney for Lake Lawrence, Inc., before Chief Justice Wright on November 9, 1978 on Respondents motion for discretionary review to reverse the Court of Appeals Order of Certification And Stay Order. Counsel understands that the Chief Justice ruled that arguments on the motion

would be considered on the Court ruling on the certification. Since Lake Lawrence, Inc. argues that the Court of Appeals did not have statutory authority to accept appeal and the appeal of the Appellants amounts to the direct review of findings and conclusions of the Shorelines Hearings Board from which they did not appeal and were incorporated in the findings of the Superior Court which they are now appealing, this memorandum is filed for consideration of the Court on whether to accept certification as a matter of its original jurisdiction. Maple Leaf v. Dept. of Ecology, 10 Wn. App. 586, 521 P.2d 742 (1974).

ORAL ARGUMENT OF LAKE LAWRENCE, INC.

SUMMARY:

There are four irrefutable arguments why this Court should not accept certification of Appeal:

1. THE COURT OF APPEAL DID NOT HAVE JURISDICTION AS A MATTER OF RIGHT OF THE APPELLANTS TO APPEAL AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT AND WITHOUT SUCH RIGHT WERE WITHOUT JURISDICTION TO CERTIFY THE APPEAL TO THE SUPREME COURT.

2. THE APPEAL OF THE SUPERIOR COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE INTERLOCUTORY ORDER BASED ON THOSE BINDINGS IS BARRED BY STATUTE, RCW 34.04.130 (1), AS WELL AS THE STAY, RCW 34.04.130 (3).

3. THERE IS NOT AN ISSUE OF BROAD PUBLIC IMPORTANCE TO BE HEARD BY THE COURT IF CERTIFICATION IS ACCEPTED.

4. THE SUPERIOR COURT DID NOT FIND A STATUTE UNCONSTITUTIONAL TO WARRANT CERTIFICATION BY THE COURT OF APPEALS.

I.

ARGUMENT ONE

The appeal is prohibited by Rules of Appeal. The interlocutory Superior Court order is not a final judgment. It specifically reserved its jurisdiction for decision of issues of fact and law that remain pending in the Superior Court. The appeal was wrongfully and prematurely taken to obtain a stay of trial court proceedings contrary to and in violation of Rules of Appeal, 2.1, 2.2, 8.1 and emergency relief under 17.4 (b). The Court of Appeals did not have jurisdiction to accept appeal as a matter of right and certify the appeal to this Court.

II.

ARGUMENT TWO

The appeal of the Superior Court's Findings of Fact and Conclusions of Law is barred by statute. RCW 34.04.130 (1), Administrative Law provides:

> "Any person aggrieved by a final decision in a contested case is entitled to judicial review thereof only under the provisions of this 1967 Amendatory Act, and such person may not use any other procedure to obtain judicial review of a final decision."

After the Shorelines Hearings Board decision of March 23, 1978, on environmental issues decided by final decision on a contested case in favor of the Respondents the Appellants elected not to appeal the decision to the Superior Court and held new hearings by a procedure of their own making over the objection of the Respondents on the same issue of environment decided by the Shorelines Hearings Board decision.

The validity of the Appellant's action is one of the issues decided by the Superior Court pursuant to the stipulation entered on July 6, 1978, between the parties and on appeal herein. That statute was binding upon the Superior Court in making its Findings of Fact and Conclusions of Law incorporating the Shorelines Board decision and order the Appellants to issue a Substantial Development Permit and approve the Preliminary Plat.

The hearings held by the Appellants after the Shorelines Board decision were in specific violation of RCW 34.04.130 (1) and by appealing the Superior Court Findings of Fact and Conclusions of Law incorporating the final decision of the Shorelines Board the Appellants are trying to circumvent that statute again by doing indirectly that which they were prohibited from doing directly on not having appealed the Shorelines Board decision, which decided the same issues of fact and law they now seek to appeal.

III.

ARGUMENT THREE

There is not an issue of broad public importance of whether a Board of County Commissioners may impose more stringent environmental restrictions than those placed on the project by the Shorelines Hearings Board decision. Such an issue is an issue framed by the Court of Appeals outside of the scope of the issue stipulated between the parties and the pleadings in the case. The Appellants seek indirectly that what they should have done directly by appealing the Shorelines Hearings Board decision in the first instance to the Superior Court. This is why they seek to obtain a reversal of the trial court's Findings of Fact and Conclusions of Law incorporating the Shorelines Board decision in this Court by a unique argument

of law that they are not bound by the Shorelines Board decision or the Superior Court decision as a matter of their authority to nullify the Shorelines Hearings Board decision on an environmental issue under the platting law, RCW 58.17.110. As County Commissioners they have manufactured the issue they ride upon appeal.

IV.

ARGUMENT FOUR

There is no finding by the Superior Court that found a statute unconstitutional to warrant certification of appeal being accepted pursuant to RCW 2.06.2030 and Rule of Appeal 4.2 that require this Court's exclusive jurisdiction where a trial court has held a statute invalid. It is the unique procedure and theory which the Appellants desire this Court to hear on a premature emergency appeal instituted by them that if accepted on the merits would render the platting statute RCW 58.17.110 unconstitutional and violate the procedure for contesting a final decision of the Shorelines Board in a finding of the Superior Court.

In essence they interpret that the platting statute gives them unlimited power to approve or disapprove a Preliminary Plat as a matter of "public interest", environmental grounds or otherwise, that they decide is in the "public interest" without considering that the specific factors listed in that statute with the words "public interest" limit their authority to consideration of those factors listed, or other factors unlisted in the same sui generis as those listed.

In effect Appellants argue that all the platting statute needed to say was that local governments have power to approve or disapprove a Preliminary Plat on grounds of "public interest"

that local government in its sole discretion may decide.

Such interpretation would make the statute vague, meaningless, indefinite and uncertain and in violation of substantive due process of the 14th Amendment. Such unique theory, if upheld on appeal, would render meaningless the purpose clause of that platting statute, the listing of factors in RCW 58.17.110, the Shorelines Management Act and the State Environmental Act governing permits for the subdivision of lands for the protection of the environment for the same "public interest" over which the Appellants maintain they have sole authority under the words "public interest" in the platting statute to render "moot" the Shorelines Board decision from which they did not appeal.

Prior to 1971 the law contained no environmental restrictions on the subdivision and use of land. This is self evident by the development of the single family residences on the adjacent properties to the site. The same substantive provisions of the platting laws applied in 1971 when eagles visited the lake that now apply. In 1971, as now, RCW 58.17.110, delegates authority to local government to approve or disapprove a Preliminary Plat on the grounds of "public interest" by considering only certain factors listed as being or not being in that "public interest". In 1971, as now, RCW 58.17.110 does not list any environmental factors to be considered by local government as being or not being in the "public interest".

In 1971 the first environmental legislation was passed regulating the use of property for the protection of the natural environment. The Shorelines Management Act and its companion the State Environmental Protection Act. The Substantial Development Permit is the ticket on lands adjacent to shorelines for environmental approval of a

Preliminary Plat pursuant to the Shorelines Management Act and not approval of a Preliminary Plat pursuant to the platting statute. Otherwise there was no purpose in my client having applied for a Substantial Development Permit. The Appellants argument would lead one to believe that if in a case the Shorelines Board ruled that a Substantial Development Permit should not be issued for not protecting the environment that after such ruling under the platting they could issue a Substantial Development Permit and approve the Preliminary Plat after holding new hearings and resolving in favor of the applicant the same issue decided not in favor of the applicant.

V.

FINAL DECISION OF SHORELINES HEARING BOARD NOT APPEALED TO SUPERIOR COURT NOT IN ERROR

The State Environmental Protection Act limits the permit process of government to consideration of environmental impact before issuing permits, including a Substantial Development Permit. It requires a Draft Environmental Impact Statement and a Final Environmental Impact Statement for that consideration. A Draft Environmental Impact Statement and a Final Environmental Impact Statement were issued in this case by Thurston County. The Final Environmental Impact Statement set forth that there would be no significant impact to the State of Washington eagle habitat. The Shorelines Hearings Board considered those statements, the Preliminary Plat, the Total Proposal, Transcripts of public testimony in hearings before Thurston County, and new testimony in a four day contested case. Therefore necessarily the State Environmental Protection Act was complied with for the protection of environment in the process of the Shorelines Hearings Board making its decision.

In 1976 Thurston County by the mandate from the Shorelines Management Act adopted as a regulation for the protection of environment on lands on shorelines of waters within the County, the Thurston County Master Program. The environmental use of the land on shorelines is regulated by that Master Program's classification within the County of four categories of environmental zoning regulating human use and activity on lands adjacent to shorelines of the County from least to most in the following order: "urban", "rural", "conservancy", and "natural" environment. In the urban and rural environment classifications no consideration to the environment for the protection of wild life is set forth in regulating the human use or activity on land designated in those classifications. In rural environment frist [sic] priority is to single family residence and density is controlled by prohibiting more than 2 residential home sites per acre.

As set forth in the Thurston County Master Program the site of my client and two thirds of the adjacent land to the shorelines of Lake Lawrence was zoned and designated in the rural environment zoning classification, without restricting human use of that property designated for the protection of wild life.

The Appellants admit the Preliminary Plat submitted by my client has complied with all specific factors for Preliminary Plat approval listed in RCW 58.17.110. The Preliminary Plat and the Total Proposal of my client complys with all laws and regulations as a matter of fact and law of the Shorelines Management Act and the Thurston County Master Program protecting the environment. This is confirmed by the Findings of Fact and decision of the Shorelines Hearings Board on March 23, 1978 from which the Appellants saw fit not to appeal.

The Shorelines Hearings Board found that the site was no significant value for the habitat of eagles. Findings of Fact by the Shorelines Hearings Board decision and the Superior Court have been entered that the lake is not a primary feeding ares [sic] not a nesting area and not a roosting area for eagles, from which the Appellants indirectly seek review by reference to their own findings entered after the Shorelines Hearings Board decision. When the Shorelines Hearings Board resolved the issue of fact of the protection of the environment and the Appellants did not appeal to the Superior Court as provided by law the Findings of Fact as to the eagle issue as grounds for denying a Substantial Development Permit and for Preliminary Plat approval became conclusive on the Superior Court and the Court of Appeals pursuant to RCW 34.04.130 and the Appellants were prohibited in holding new hearings and entering any facts and conclusions.

VI.

ISSUE BEFORE SUPREME COURT IF CERTIFICATION ACCEPTED

The issue therefore in this Court is, is this Court going to accept appeal and stay the order of the Superior Court on the grounds that this Court has jurisdiction to accept appeal and hear appeal on the unique theory of the Appellants that under the authority of the platting statute (a statute whose purpose is not to protect the environment), that they, the Appellants, had authority by the platting statute on an environmental issue to render the Shorelines Management Act and the Shorelines Hearings Board decision in their phase "moot", although not having appealed from such Shorelines Hearings Board decision. Does this Court have jurisdiction to stay the Superior Court interlocutory order for the issuance of a Substantial Development Permit and approval of Preliminary

Plat which is based upon the Shorelines Hearings Board decision from which they did not appeal because of conclusions made by the Appellants after that Shorelines Board decision different from that final decison on the same issue?

CONCLUSION

The matter should be remanded to the trial court for final determination with an appropriate order for compensatory damages to the Respondents for violation of the rules by the Appellants.

s/
Philip P. Malone
Attorney for Lake Lawrence, Inc.

FILED:
11/17/78

APPENDIX A - RECORD

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC.,	
Petitioners,	NO. 45816 (Court of Appeals Cause
v.	No. 3662-II)
THURSTON COUNTY BOARD OF COUNTY COMMISSIONERS, et al.,	
Respondents,	ORDER ACCEPTING CERTIFICATION AND CONTINUING
v.	STAY ORDER
LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, et al.,	
Intervening Respondents.	

This case was certified to the Supreme Court by Division Two of the Court of Appeals as presenting issues of broad public import appropriate for direct reveiw. RAP 4.2(a)(4).

Having considered the order of certification and considering the objections of respondents, the Chief Justice finds that determination of the issues presented by the Supreme Court is warranted. Pending the filing of an opinion by this court, the stay order of the Court of Appeals shall remain in effect.

DATED at Olympia, Washington, this 17th day of November, 1978.

s/
CHIEF JUSTICE

APPENDIX A - RECORD
SUPREME COURT DECISION, OCTOBER 4, 1979

[No. 45816. En Banc. Oct. 4, 1979]

THE DEPARTMENT OF NATURAL RESOURCES, ET AL,

Respondents, v. THURSTON COUNTY,

ET AL, Appellants.

[1] Plats -- Environment -- SEPA -- Plat Approval -- Power of Local Government. When considering a preliminary plat of a subdivision, a local governmental decision-making body is required by the State Environmental Policy Act of 1971 to consider environmental effects and is empowered by SEPA to deny the plat on environmental grounds.

[2] Plats -- Environment -- Shoreline Managment [sic] -- Approval of Permit -- Effect Upon Plat Proposal. A finding of the Shorelines Hearings Board that a proposed preliminary plat is adequate for granting a shorelines substantial development permit is relevant only to the jurisdiction of the board under the shorelines managment [sic] act and does not preclude a local governmental decision-making body from denying the plat upon environmental considerations.

[3] Statutes -- Constitutional Challenge -- Vagueness -- Application. Only regulatory statutes prohibiting certain types of conduct and imposing sanctions for violations of their standards may be challenged for vagueness.

[4] Environment -- SEPA -- Delegation of Powers -- Validity. The substantive authority delegated by SEPA to local governmental bodies to apply environmental standards when making land use decisions is a valid delegation of legislative power.

[5] Eminent Domain -- Constitutional Taking -- Public Property. An unconstitutional taking of property for public use without just compensation can occur only when the property taken is private rather than public.

[6] Eminent Domain -- Constitutional Taking -- Determination. When determining whether governmental action constitutes a taking of private property, a court will balance the public interest in regulating the use of the property against the private interests infringed upon. In determining the degree of infringement of the private property interests, the court will consider the type of encumbrance imposed and whether the owner thereafter can adapt the property to a reasonably profitable use.

Stafford, J., did not participate in the disposition of this case.

Nature of Action: A private developer and a state agency, the agency having leased land bordering on a lake to the developer, sought a review of a decision by a board of county commissioners denying their application for a preliminary plat and a shoreline substantial development permit on environmental grounds. Following an order of the Shorelines Hearings Board reversing the denial of the shoreline development permit, the plaintiffs further sought a writ of mandamus to compel the commissioners to issue the shoreline devlopment [sic] permit and to approve the preliminary plat.

Superior Court: Consolidating the actions for review and mandamus, the Superior Court for Thurston County, Nos. 58623, 59975, Richard L. Pitt, J., on September 25, 1978, ordered the commissioners to issue a shoreline development permit and to approve the preliminary plat.

Supreme Court: Holding that the commissioners had independent authority under SEPA to deny the plat for environmental reasons despite inconsistent findings of the Shorelines Hearings Board, and finding that the denial of the preliminary plat did not constitute an unconstitutional taking of private property for public use without just compensation, the court reverses the judgment.

Patrick D. Sutherland, Prosecuting Attorney, and Alexander W. Mackie, Special Deputy, for appellant Thurston County, et al.

Thomas H.S. Brucker, Roger M. Leed, and Smith, Brucker, Winn & Ehlert, for appellant Lake Lawrence Public Lands Protection Association, et al.

Slade Gorton, Attorney General, and J. Lawrence Coniff, Jr., Assistant, for respondent State.

Philip P. Malone, for respondent Lake Lawrence, Inc.

Slade Gorton, Attorney General, Charles B. Roe, and Robert V. Jensen, Assistants, amici curiae.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC.,	)	
Respondents,	)	NO. 45816
v.	)	EN BANC
LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, THURSTON COUNTY BOARD OF COUNTY COMMISSIONERS,	)	
Respondents/ Cross-Appellants.	)	Filed: Oct. 4, 1979

HOROWITZ, J.--The central issue raised by this appeal is whether the Thurston County Board of County Commissioners, considering whether to deny a preliminary plat on environmental grounds, is bound by a finding of the Shorelines Hearing Board in a related proceeding that the plat is adequate to protect the environmental resource. We hold the County Board is not precluded from reaching a different conclusion on the environmental issue and denying the plat, and that the Board's decision to deny the plat did not violate the applicant's constitutional rights. We accordingly reverse.

At issue here is the proposal of Lake Lawrence, Inc. to develop a 14-acre parcel of land known as Wood Point on the shore of Lake Lawrence, a small lake in Thurston County. The shoreline of the lake is presently only partially developed. Wood Point is in a natural state, covered with second growth timber and dense underbrush. It is designated a "rural environment" in the County's Shoreline Master Program, allowing low-intensity

land use, with residential development not exceeding two dwellings per acre. Title to the property is held by the State Department of Natural Resources in trust for the University of Washington. Desiring to make the land income-producing, the Department leased it to Lake Lawrence, Inc. for a term of 55 years. The parties intended that the lessee would develop the land into single-family residential units.

In January 1977 Lake Lawrence, Inc. applied to the County Board of Commissioners (the Commissioners) for approval of a preliminary plat and shoreline substantial development permit for its project. In the ensuing months the County Planning Commission gathered evidence anbd testimony regarding the proposal. A draft environmental impact statement (EIS) was prepared, public hearings were held, and in May 1977 a final EIS was filed with the Planning Department. During the course of this investigation it became known to county planners that bald eagles use the Wood Point site for perching and feeding from the well-stocked lake. The EIS documented environmentalists' concern over the eagle habitat, and the conclusion of at least one consultant that development of Wood Point could drive bald eagles from the area. After visiting the site to observe perching eagles the planning staff recommended denial of the plat application. The Planning Commission itself, however, lacked a quorum to render a decision at its July 1977 meeting, and thus forwarded the proposal to the Commissioners with no recommendation.

The Board of County Commissioners held two public hearings on the plat proposal in August and September 1977. On the date of the second hearing the developer submitted a revised plat intended to provide more protection to the wildlife habitat, particularly to the trees identified as favored perching sites for the eagles. The revised plat

set aside three lots on the shoreline as an eagle preserve and created a 75-foot buffer zone along the shoreline, but maintained a density of 22 residential units in the 14-acre parcel. After receiving testimony from environmental experts as well as members of the community, the Commisioners [sic] voted unanimously to deny the application for a preliminary plat and shoreline development permit. The denial was based on the eagles' status as endangered birds in Thurston County, the County's comprehensive plan calling for preservation of the County's wildlife, and the Department of Game's recommendation that a buffer strip of 200 feet or more be required to preserve the site's value as a bald eagle habitat. The proposed plat does not provide such a buffer between the eagles' preferred perches and human habitation or development, and it also allows substantial development between these perches and a marsh area which is critical to the eagle habitat. The commissioners also voted at the September meeting to request the Planning Department to reconsider the master program designation of the area as rural in light of the evidence of its use as a habitat for endangered birds.[1]

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[1] Contrary to respondents' contention, the Commissioners' request does not amount to an attempted rezone or spot-zone. It is not in itself a zoning action. Nor does it create a classification different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan which governs here. Cf. Smith v. Skagit County, 75 Wn.2d 715, 743, 453 P.2d 832 (1969).

Lake Lawrence, Inc. and the Department of Natural Resources (hereinafter referred to as respondents) sought review of the Commissioners' action through two separate and appropriate means. Review of the plat denial was sought in the Superior Court for Thurston County pursuant to RCW 58.17.180, a provision of the platting statute which provides for judicial review of any decision approving or denying a plat. Review of the denial of the shorelines substantial development permit was sought before the Shorelines Hearing Board (the Board) pursuant to RCW 90.58.180, a provision of the Shorelines Management Act of 1971 (the SMA).

In February 1979, before the matter of the plat denial had come to trial in Thurston County Superior Court, the Board held a hearing on the denial of the shoreline development permit. The Board received substantial testimony regarding the proposed project and the environmental issues it raised. In its findings of fact the Board noted that bald eagles have long been observed at Lake Lawrence and the Lake is an incidental perching area for these eagles. The Board also found that preservation of the perching trees together with a surrounding buffer was a proper condition of development of Wood Point. The Board found, however, that setting aside three waterfront lots as an eagle preserve, and maintaining a 75-foot buffer area along the shoreline provides adequate protection against significant adverse effect to the eagles. The Board concluded the proposed substantial development in the shoreline is consistent with the County's master program and the SMA, and that a permit for the shoreline development should not be denied. The Board's order thus reversed the denial of the shoreline development permit and remanded to the County for further proceedings.

Following the Board's decision the Commissioners moved in superior court to have the record

on review of the plat decision returned to permit reconsideration. After the motion was granted and the record returned, the Commissioners called another public hearing to take additional testimony and to reconsider approval or denial of the plat based on the new evidence and the Board's decision. On April 24, 1978, after hearing additional testimony, visiting the site, considering the record and arguments of counsel, and considering an alternate configuration for the project which preserved the 22-unit density, the Board once again unanimously denied the preliminary plat. The Commissioners entered detailed findings of fact and conclusions of law, and gave specific reasons for its denial, thus meeting the requirements for specificity imposed by this court in Parkridge v. City of Seattle, 89 Wn.2d 454, 573 P.2d 359 (1978), which had been decided in the interim between the Commissioners' first and second votes on the plat.

The Commissioners disagreed with the Shorelines Hearing Board that the plat was adequate to protect the eagle habitat, finding it would be disruptive to feeding and perching activities and would not assure continued availability of the site to the eagles.[2] The Commissioners detailed at length the features of the plat proposal which are unacceptable, particularly the developer's insistence that 22 residential units be included. The Commissioners concluded such a plan could not adequately mitigate the adverse effect on the birds, that the proposal was not in the "public interest" within the meaning of the platting statute, and that the plat must therefore be denied.

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[2] The Commissioners did not appeal the Board's finding, concluding the issuance of a shoreline substantial development permit was rendered moot by the denial of the plat.

Following this second denial of the preliminary plat the respondents filed a petition in superior court for a writ of mandamus to compel the Commissioners to issue a substantial development permit and to approve the plat. The petition was initially denied on the ground there was an adequate remedy at law. At the same time the court granted the motion of Lake Lawrence Public Lands Preservation Association, an association of interested local citizens, to intervene. At trial the court considered the full record before the Commissioners on remand, and also allowed respondents to reargue their mandamus claims. Upon entering findings of fact and conclusions of law, the court issued an order directing the Commissioners to issue a substantial development permit and to approve the preliminary plat.

The court's findings which are central to this appeal are: (1) the Commissioners are bound by the Shorelines Hearing Board's finding that the proposed plat is adequate to prevent any significant adverse effect on the eagles using the site; (2) the Commissioners have no authority under the platting statute to deny a plat on environmental grounds, and the authority to do so under the State Environmental Policy Act (SEPA), RCW 43.21C, was preempted by the Board's decision on the matter; (3) the Commissioners' application of the "public interest" clause of the platting statute to deny the plat on environmental grounds renders the clause unconstitutionally vague; and (4) denial of the plat to preserve the perching and feeding site for the eagles is an unconstitutional taking.

We hold the Commissioners are not bound by the Shorelines Hearing Board finding, and that they have independent authority under SEPA to consider the environmental issue and deny the plat for environmental reasons. We further hold that denial

of the plat in this case does not violate respondents' rights to due process, or constitute a taking of private property for public use without compensation.

I.

The central question which emerges from this complex case is whether the Commissioners have the authority to deny a preliminary plat on environmental grounds and, if so, what effect the Shorelines Hearing Board's finding had on the Commissioners' authority here. There is no longer any question that a governmental decision-making body whose deliberation is subject to the requirements of SEPA is empowered by that act to deny a project application on environment grounds. In Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978) this court recognized this substantive aspect of SEPA as a supplement to all other statutory authorization. The procedural requirements of SEPA for consideration of the environmental effects of proposed developments will not be rendered meaningless by denying the authority of the decision-maker to reject a proposal on the basis of the adverse environmental effects it has discovered through the process. See RCW 43.21C.060, a provision of SEPA recognizing the authority of the governmental decision-making body to condition or deny a request for action on the basis of specific adverse environmental impacts.

Similarly, there can be no question of the application of SEPA to the plat-approval process. The Thurston County Board of County Commissioners is required by SEPA to deliberate on environmental concerns as a part of the platting decision process. Loveless v. Yantis, 82 Wn.2d 754, 513 P.2d 1023 (1973). The requirement of the platting statute in RCW 58.17.110 that the County Commissioners determine if "the public use and interest

will be served by the platting" in fact serves to emphasize the significance of early inquiry into environmental matters. Loveless v. Yantis, supra, at 765.

As noted in Loveless, the absence of environmental criteria from the platting statute is immaterial, for the obligation and authority to consider such matters is provided by SEPA.

As we have repeatedly pointed out, SEPA is an overlay of law which supplements existing statutory authority. See, for example, Bellevue v. Boundary Review Board, 90 Wn.2d 856, 586 P.2d 470 (1978); Polygon Corp. v. City of Seattle, supra, Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976; Eastlake Community Council v. Roanake Ass'n, 82 Wn.2d 475, 513 P.2d 36 (1973). Thus, it makes no difference that the platting statute does not provide explicit authority to deny the plat on environmental grounds, because SEPA does provide such authority. The Commissioners here were required by SEPA to consider the possible adverse impact of the proposed plat on the use of Wood Point for eagle perching and feeding, and were empowered by SEPA to deny the plat on the ground the adverse impact was too great. The question remains, however, what legal effect the Shorelines Hearing Board's finding had on the Commissioners' reconsideration of the plat.

It is respondents' contention that the Commissioners were bound by the Board's finding that the proposed plat provided adequate safeguards to protect the eagles, since they took no appeal from the Board's decision. They maintain the Commissioners were thus barred from receiving additional evidence on the issue upon reconsideration, and likewise were barred from reaching a different conclusion on the factual question. Since the Commissioners specifically found that the proposed

plat met all requirements of the platting statute and the County Code, respondents maintain the Commissioners are therefore compelled to approve the application. This argument misconstrues the nature of the SEPA mandate for environmental consideration, and the scope of the Shorelines Hearing Board's jurisdiction.

The Board's jurisdiction under the Shorelines Management Act in this case was to determine whether the request for a substantial development permit is consistent with the County's Shoreline Master Program and the provisions of the SMA. RCW 90.58.140(2)(b). The Act provides for direct regulation of activities within the "shorelines" of the state, which are defined to include the lands extending landward for 200 feet from the high water mark. RCW 90.58.030(2)(d),(f). In making its determination whether a permit for development within this Shoreline may issue, the Board is subject to the mandates of SEPA to consider environmental concerns. Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977). It is likewise empowered by SEPA to deny or condition the permit application on the basis of specific adverse environmental effects discovered in the process of these deliberations. See Polygon Corp. v. City of Seattle, supra; RCW 43.21C.060. The scope of the Board's jurisdiction, however, is not broadened by the provisions of SEPA. The Board is empowered to determine whether a shoreline substantial development permit should issue, and its deliberations under SEPA are confined to that purpose.

This fact was recognized by the Board in its Final Findings, Conclusions and Order. The Board specifically stated it was reviewing the denial of the shoreline permit "within the context of the Shoreline Management Act . . . Other requirements and approvals for the proposal must nonetheless be met before the proposal can proceed." The Board

also limited its conclusions of law to determination of the consistency of the proposal with the County's Master Program and the Shoreline Management Act.

In short, the Board's finding that the proposed plat was adequate to protect against adverse effects to the eagles is limited in its relevance and binding effect to the narrow jurisdiction which the Board is empowered to exercise. Implicit in the Board's finding that the plat is adequate is the qualification that the finding is made for the purposes of a shoreline development permit. It cannot bind the County Commissioners in their determination of an entirely different question--whether the preliminary plat should be approved. This conclusion follows from the limited and differing jurisdictions of the decision-making agencies, and from the unique nature of SEPA as a supplement to the statutory authority of each agency.

In contrast to the jurisdiction of the Shorelines Hearing Board to inquire into the consistency of a proposed shoreline development with the County's Master Program and the Shoreline Management Act, the County Commissioners must inquire "into the public use and interest proposed to be served" by the plat. RCW 58.17.110. Its jurisdiction is not restricted to consideration of the project's effect on the waters and the relatively narrow strip of land bordering them. Indeed, in this case, some of the perching trees used by the eagles at Wood Point are outside the 200 foot area of the shoreline, and are therefore beyond the power of the Shoreline Hearing Board to directly regulate. See RCW 90.58.140, .180. These trees and the rest of the eagle habitat are the special concern of the Commissioners in determining whether to approve the preliminary plat, however, and in considering the plat's effect on this habitat they must bring a broader view of the project to bear.

In summary, the environmental determinations mandated by SEPA are uniquely related to the particular decision being taken, and are conclusive only for that purpose. They are not binding on other decision-making bodies. To hold otherwise would allow one decision-making body to preempt the authority of any other decision-making body considering a related question to evaluate a particular environmental issue, and would foreclose independent analysis and deliberation. Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values. See RCW 43.21C.030.

It follows from our conclusion that the Commissioners are not bound by the finding of the Shorelines Hearing Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal, and had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagle.

II.

The trial court held the Commissioners' determination that approval of the plat was not in the "public interest" was an unconstitutionally vague application of the platting statute. Since we are not concerned here with a regulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standards, the vagueness doctrine as such is not applicable. See Blondheim v. State, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975). We interpret the trial court's conclusion to be a determination that the authority granted to the Board of Commissioners to deny a plat in the public interest does not meet constitutional standards for a delegation of legislative power. As noted above, the Commissioners' authority to deny the plat on environmental grounds

derives essentially from SEPA, and not from the platting statute alone.

The validity of SEPA as a delegation of substantive legislative authority to apply its standards in a particular case was specifically upheld in Polygon Corp. v. City of Seattle, supra at 66. The court held that SEPA provides constitutionally adequate guidelines for governmental decision-making under the act, and that procedural safeguards are adequate if an opportunity to be heard is provided, and judicial review of the entire record is available. That is the case here. We therefore conclude there is no constitutional objection to the Commissioners' exercise of their authority under SEPA to deny the plat on environmental grounds.

III.

The remaining issue is whether the trial court erred in its determination that denial of the plat on the ground it was inadequate to protect the eagle habitat was an unconstitutional taking of private property for public use, in violation of Const. art. 1, § 16 and the Fifth Amendment to the United States Constitution. As a preliminary matter, the Commissioners raise the question whether the taking provisions apply in this case, since the property at issue is owned by the state. Under the rule of Moses lake School Dist. 161 v. Big Bend Community College, 81 Wn.2d 551, 503 P.2d 86 (1972) there can be no unconstitutional taking when the property taken is public and not private. While this rule may preclude respondent Department of Natural Resources from complaining, Lake Lawrence, Inc., as lessee of the land, has a private real property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation.

The determination whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interests against the public interest in imposing the regulation is question. Maple Leaf Investor, Inc. v. Dept. of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977). In considering the encumbrance on the property owner, the court will consider both the type of encumbrance imposed and whether the owner is thereby prevented from making a profitable use of the property.

Of crucial importance in this case is the fact that the Commissioners' decision to deny the plat leaves open the possibility of approving a less dense development of Wood Point. The Commissioners have consistently maintained they would entertain an application for a plat which provided an adequate buffer zone for protection of the eagles' preferred perching and feeding areas. It should be noted that the Commissioners did not find any adverse impact from development of eleven of the proposed lots. Moreover, the findings provide specific guidelines for planning a buffer zone the Commissioners would find acceptable. Finally the decision left open the possibility of an alternate cluster configuration for the development--a configuration specifically favored by the County's Comprehensive Plan.

Thus, while it is clear the Commissioners will not approve a plat providing the single-family unit density proposed by respondents here, specifically because that degree of density does not provide adequate protection for the eagle habitat, the decision leaves open the possibility of a less dense development which would preserve the eagle perching resource. The facts apparent from the record in this case do not support a conclusion that "there is no present, possible, and reasonably profitable alternative use to which his property is

adaptable." Carlson v. Bellevue, 73 Wn.2d 41, 51, 435 P.2d 957 (1968).

We also note there is no physical intrusion or damage created by the regulation, no public project is enhanced, and no public use of the land is created. See Rains v. Dept. of Fisheries, 89 Wn.2d 740, 575 P.2d 1057 (1978); Maple Leaf Investors, Inc. v. Dept. of Ecology, supra at 733.

The strong public policy interest being advanced by this regulation of respondent's use of the leasehold is the preservation of a valuable environmental resource which is identified as such in the County's Master Program. Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no taking in violation of the state and federal constitutions.

Our decision that the County Board of Commissioners' denial of the preliminary plat application is valid renders moot the question whether the trial court erred in issuing a writ of mandamus. We also need not reach the other assignments of error made by the appellant Commissioners. Respondents raised new questions in their briefs regarding the Commissioner's compliance with due process requirements in conducting the hearings on remand. These arguments were not made below, and the court entered no findings on the question. It is apparent, however, from the additional material provided

in the Commissioners' reply brief that respondents were fully accorded due process through notice and opportunity to be heard.

Reversed.

s/
Horowitz, J.

WE CONCUR:

s/
Utter, C.H.

s/
Brachlenbach, J.

s/
Rosellini, J.

s/
Dolliver, J.

s/

s/
Hicks, J.

s/
Wright, J.

s/

s/

s/

NO. 45816

APPENDIX A - RECORD

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC.,
Respondents,

vs.

THURSTON COUNTY; GEORGE BARNER, JR.; DEL PETIT and MARJ YUNG
constituting the Board of Thurston County Commissioners and as individuals,
Appellants,

vs.

LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK,
Intervenors.

MOTION FOR RECONSIDERATION BY
LAKE LAWRENCE, INC.

Philip P. Malone, Attorney for
Lake Lawrence, Inc.

153 1st Street
P.O. Box 443
Poulsbo, Washington 98370
Phone: (206) 779-5518

MOTION for consideration is made by Lake Lawrence Inc., (L.L. Inc.,) by its counsel, Philip P. Malone, requesting the Court to reconsider its opinion entered October 4, 1979, call for new argument, reverse its opinion, affirm the mandatory order of the court, and terminate the stay of the court's proceedings on liability, damages and compensation so that trial (prematurely stayed) may continue and a gross miscarriage of justice not take place. This motion is based on errors of the opinion.

I.

STATEMENT OF REVIEW

The subject for de novo review by the Court was to determine if the court's mandamus order requiring the Commissioners to grant approval of a preliminary plat and issue a SMA permit (an interim order pending trial on issues of liability) should be reversed. The court issued the order on the basis that the findings of fact and conclusions of law of the Shorelines Board had become final. the court adopted those findings after the appellants had not appealed the Board's decision as proof of the facts and conclusions of law contained therein that L.L. Inc., had complied with the limitations of private use of its property in accordance with limitations of use regulated by the platting statute, SEPA, SMA and the master program and, therefore, was entitled to an order requiring the appellants to approve the plat and issue the permit upon having reviewed the issues of fact and law to which the parties stipulated to be reviewed, the mandamus relief requested by the respondents pleadings, for the mandamus order to be granted.

The Court has, instead, without reference to determining the issues set forth in the stipulation between the parties for review to determine if

whether a mandamus order be granted, adopted the findings and conclusions of the Commissioners of May 30, 1978, made and determined by them while adversary parties and when not appealing the Board's decision. The Court has concluded that the Commissioners by having independent, separate, SEPA authority not to be bound by the Board's findings and conclusions (Opinion 7-10), ignoring the facts that they had not appealed and were adversary parties to the mandamus action) therefore: ". . . had authority to take additional testimony for the purposes of reconsidering the plat proposal, and had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagles." (p. 11, emphasis added.) It is to be noted that SMA declares the shorelines of the state are natural resources of the state, including wildlife. RCW: 90.58.020.

The stipulated issues of fact and law for de novo review were to determine not only whether the Commissioners had constitutional and statutory authority while adversary parties and when not appealing, but also whether they had constitutionally exercised statutory authority to: "(a) . . hear new evidence. ."; "(b) Make a new decision on the record before the Shorelines Hearings Board and the evidence at new public hearings contrary to and in conflict with the prior Shoreline Hearings Board judgment on the same matter; (c) Enter Findings of Fact and Conclusions of Law, and Judgment contrary to and in conflict with the Shorelines Hearings Board judgment of March 23, 1978.", when not appealing and while adversary parties to the mandamus proceedings.

The respondents application for a peremptory writ alleged:

> "There are no issues of fact or of law to be decided by the Court, and the petitioners

> are entitled to a Peremptory Writ of Mandamus in accordance with its proposed Writ hereof, and in compliance with the decision of the Shorelines Hearing Board of March 23, 1978, which the respondents, in violation of the law, have circumvented, and declared to be "moot", and based their decision upon subjective standards of their own making and without reference to either the substance or procedure of the environmental laws of the State of Washington and Thurston County." CP: 41-42, emphasis added.

Pursuant to the stipulation and the mandamus application there was at all times subject to judicial review not only the issue of law if whether Commissioners have SEPA authority, but more important to the interests of the respondents was whether the Commissioners were constitutionally exercising those powers within the safeguards of procedural and substantive limitations of SEPA when re-reviewing the Board's decision while adversary parties and when not appealing.

II.

SUMMARY OF ERRORS FOR RECONSIDERATION

A summary of the errors assigned for reconsideration are:

2.1 Review without due process of law, RCW: 34.04.130.

The Commissioners re-review of the Board's findings, conclusions and decision, the court and this Court's review were subject to to [sic] the procedural mandates of RCW 34.04.130 (1). The Court without due process of law did not conduct a de novo review within the procedrual [sic]

limitations of RCW 34.04.130 (1) to determine if whether the plat-proposal use of private property by L.L. Inc., complied with the existing laws of the platting statute, SEPA, SMA and the master program establishing the rights of use of private property for which application was made to determine if whether the mandamus order should be reversed, but in violation of RCW 34.04.130 (1) to decide that issue, adopted the Commissioners findings, conclusions, and decision that were made in violation of the procedural law of RCW 34.04.130 (1).

Even if the Commissioners were not procedurally bound by RCW 34.04.130 (1), the Court's review of their action was subject to determining the substantive issues set forth in RCW: 34.04.130 (6), (a), (b), (c) and (f) with the issues of the stipulation to determine the ultimate issue by a broad review of the evidence if in fact the Commissioners were cosntitutionally exercising statutory authority, be it SEPA authority or otherwise, or exercising authority of their own making for which the mandamus order was granted. Such a determination was to be made as a matter of proof between adversary parties on de novo, broad review of evidence in the record as required by the "clearly erroneous" test mandated by statute for the courts to employ when reviewing an administrative action involving a SEPA or SMA issue, or mandamus relief in lieu of the "substantial evidence rule". RCW 34.04.130 (6) (e). The Court by the assumption it made did not make a review within the process of that test although required by statute to do so.

2.2 Commissioners exercise of authority without due process of law, "clearly erroneous", RCW: 34.04.130 (6)(e).

The Court having erroneously failed to make a de novo review of the stipulated issues within the

procedural mandate of RCW 34.04.130 (1), did also erroneously assume without making a broad review of the evidence in the record that the Commissioners were constitutionally exercising SEPA authority within the safeguards of its procedural and substantive limitations by having failed to make that review as required by RCW 34.04.130 (6)(e). Such assumption of facts without a broad, de novo review of the evidence in the record to determine in fact whether the appellants had and were exercising those powers of government within the scope of existing laws and regulations was a fundamental omission of a judicial duty for which courts are established to protect and maintain the rights of individuals under existing laws as a trier of the facts in dispute in adversary contested cases. If a broad review of the evident pursuant to the "clearly erroneous" standard had been made, it is evident that the Commissioners exercised authority of their own making. For not only did the Commissioners not constitutionally exercise authority within the safeguards of the procedural and substantive limitations of their authority to insure that the policies of SEPA and SMA were protected and the rights of use of property established by those laws not destroyed when a proposed use is in compliance with their regulations, they in fact did not exercise authority delegated to them by SEPA and SMA but only that of their own making and did not consider the policies of SEPA and SMA but destroyed the rights of use of private property when in compliance with their limitations.

The primary basis of the authority the Commissioners exercised their authority was to achieve the policies and goals not of SEPA and SMA but of the Thurston County Comprehensive Plan for future legislation and wherein is declared that the natural resources of wildlife belong to Thurston County and not to the state and the status of eagles as "endangered birds", is set forth. The

plan has never been implemented from the time it was made in 1975 by any existing law or regulation of the use of property. The appellants employed the plan to deny the total use of private property on an ad hoc, piecemeal, non area-wide discriminatory basis on the lake, when the master program regulations designated the site as "Rural Environment" and permitted adjacent property of the same designation "Residential Development", with which the propsoed use of Lake Lawrence, Inc. complied, the use of their property free from the limitations imposed by the Commissioners use of the comprehensive plan.

The decision of the Commissioners of May 1978 was, therefore, void as being without due process of law and the decision of the trial court adopting the findings and conclusions of the Board finally proved that the plat and proposal of L.L. Inc., (which conditioned the issuance of a SMA permit on limitations of use to mitigate the specific adverse impact to the environment of eagles identified in the EIS documents) was in compliance with SEPA, SMA, the master program, and the platting statute (existing laws and regulations). The mandamus order should be affirmed and the stay of trial court proceedings be terminated so that L.L. Inc., may have a fair trial of the issues of fact and law on the issues of liability set forth in its pleadings.

2.3 Inverse condemnation, without regulation.

The Court erroneously determined that the plan had the status of an existing law when it was employed as being a "regulation" of the use of private property. Since it was not a "regulation" of the use of private property, its employment by the Commissioners to deny the use of private property to achieve its goals and policies to preserve the site for the public use and purpose of

protecting the "endangered birds" of Thurston County was not a "regulation" of the use of that property. Lake Lawrence, Inc., has not had and by the opinion is not authorized in the future to have a "present, possible, reasonable profitable alternative use" of its property so long as the Commissioners are authorized to employ the plan and determine by their unbridled will and wisdom whether more is known about "endangered birds" of Thurston County to permit a development of the property and whether a "configuration" by some unknown procedure will satisfy that laymen's wisdom of the Commissioners. No alternative use was considered in the EIS documents which the Commissioners considered in their meeting of April 24, 1978. The Court overlooked that the "alternative" considered by the Commissioners was conditioned by their decision that more was to be known about the status of eagles in Thurston County on inland lakes and that the alternative proposed was gloved as being only a future alternative in the event the Court did not rule in their favor on the mandamus action. (CP: 121, court findings, 2.7 Alternative Conditions.) The alternative condition of the Commissioners also further limited the use of the property in excess of the limitations upon which the Board conditioned the issuance of a permit to protect that same eagle environment above the master program regulations. It is also observed that the Court made a determination of fact as to whether there was or was not a profitable alternative use when that fact had not yet been tried by the court and is still pending. The result of the determination made has denied the respondent the rights of a fair trial on that issue.

III

JUDICIAL REVIEW WITHOUT DUE PROCESS OF LAW

3.1 De Novo Review of a mandamus action and Board's decision.

This was to be a de novo review by the Court of a trial court order against public officials who should enjoy no special immunity from the judicial process of the law to judge themselves by out-of-court findings in re-review of the previous exercise of their authority and of the Board's decision, a Board especially established by law as a quase-judicial body to make a quasi-judicial decision only to be overturned by a court in court by a de novo judicial determination of the weight of evidence when having decided that the policies of SMA and SEPA for the protection of the environment are satisfied by limitations in plats and proposals for use of property on shorelines and adjacent properties, and also in protecting the rights of use of private property from decisions of local government inconsistent with the policies of SMA and the regulations of the master program.

This being a mandamus issue, the review to have been undertaken by the court was de novo and an initial determination should have been made whether the Commissioners were constitutionally and statutorally authorized to conduct hearings, make new findings and conclusions, and make a different decision on the same subject matter that the Board decided after not having appealed and while adversary parties bound by the judicial procedures for doing so set forth in RCW 34.04.130 (1). Essentially, that was the issue to which the parties stipulated for review.

(Smith v. Skagit County 75 Wn. 2d 715, 718-719, 453 P. 2d 832, (1969); Carlson v. Bellevue, 73 Wn. 2d 41, 435 P. 2d 957 (1968)).

RCW: 34.04.130 (1) provides:

> "Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof only under the provisions of this 1967 amendatory act, and such person may not use any other procedure to obtain judicial review of a final decision, even though another procedure is provided elsewhere by a special statute or statute of general application.

The Court never determined why the trial court was in error for having adopted the Board's findings and conclusions and the opinion gave no credence to why the court did so. The Court made an erroneous summary of the court's findings and ignored the Board's conclusions that were also adopted by the court. The most crucial erroneous summary was when stating that the court found:

> ". . . the Commissioners have no authority under the platting statute to deny a plat on environmental grounds, and the authority to do so under the State Environmental Policy Act (SEPA), RCW 43.21C, was preempted by the Board's decision on the matter, . . ." (Opinion page 6).

The court's Memorandum Opinion indicates that the court made a complete de novo review of the record to determine if the actions of the Commissioners were "clearly erroneous" and "arbitrary." (CP: 114-115) The court did not find that the reason id did not adopt the Commissioners findings, conclusions and decision was not that their SEPA authority was "preempted" by the Board's decision, but was that the Commissioners had not appealed, while adversary parties to the proceedings, the Board's decision by stating:

"S.E.P.A. was intended by the legislature to require environmental factors to be considered in major actions likely to affect the environment and both S.M.A. and S.E.P.A. address basically the same issues. If a county can simply disregard the decision of the Shoreline Hearing Board on an issue submitted to it for review, does that not in effect destroy the rights granted an applicant for a substantial development permit to appeal to the board and render meaningless the statutory authority of the board to review the denying of a permit? This Court feels both questions must be answered in the affirmative and the County does not have authority to review and for all intents and purposes overrule the Shorelines Hearings Board's decision on the same issues. It's obvious the respondent elected not to appeal the S.H.B. decision knowing it could not sustain the burden of appeal necessary for a reversal. If the present practice is permissable, they then shift the burden to the petitioner, who was sustained by the S.H.B. These tactics, it appears to this Court, subvert the legitimate purpose of S.M.A. and S.E.P.A. to protect the environment and make those acts the means by which private property may only be used by consent of one's neighbors." (Emphasis added.)

SEPA mandates that environmental consideration by government "action" in determining if a permit be issued (when the issuance of a permit by SEPA mandates environmental consideration) that SEPA consideration takes place at the earliest possible time prior to and along with the time the decision is made to issue the permit.

(Eastlake Com. Coun. v. Roanoke Assoc., 82 Wn. 2d 475, 513 P. 2d 36 (1973)).

SEPA consideration goes along with in time and place to supplement and add to (not replace) the authorization of other existing authorized governmental action in regulation of private property, be that authorization by way of a ministerial act of the paper issuance of a permit or involving a quasi-judicial discretionary decision. The quasi-judicial authority to determine if whether a SMA permit should or should not be issued on shorelines of the state by approving a preliminary plat triggers SEPA consideration to be made at the same time the determination is made as to whether the SMA permit should be issued as being "consistent" or "inconsistent" with SMA and the Master Program. Discretionary substantive consideration in granting or denying approval of a plat likewise triggers SEPA consideration to be made at the same time and not one independent and separate and apart from the other. Otherwise, separate decision makers can at different times preempt the decision of one another by separate consideration of another existing authorization and individual private property owner is caught in a "Catch 22" situation of separate and independent considerations by separate branches of government, one cancelling out the decision of the other, in bits and pieces, as the Court has allowed to take place in this case in the quasi-judicial process and judicial review of the Board's decision by authorizing the Commissioners to substitute their own separate findings and conclusions when they "reconsidered" those of the Board. Substitution of consideration one year after the EIS statement became final is not a supplementary SEPA consideration after not appealing the Board's decision, but is a circumvention of the judicial process under the guise of SEPA in frustration of the policies of SEPA and SMA and the authorized quasi-judicial review of the Board and the subsequent judicial review by the court.

Environmental, plat-approved consideration is not a separate, independent, authorized consideration by the authority of platting statute, or SMA or SEPA. (See 58.17.141). The County's master program subjects the subdivision of land and the construction of a community pier as being activities on the shorelines and adjacent property to the activity of "Residential Development" and, therefore, the plat-approval process is subject to the contemporaneous environmental consideration of compliance with SMA policies and master program environmental regulations for the determination if whether a plat should be approved of shoreline and adjacent properties together as one unit of a single project.

> (CP: EX. Book IX at page 3, Brief of L.L., Inc., 38; Master Program, Sec. III, Residential Development, Definition).

Nor is SEPA consideration separate and independent of SMA consideration. In Sisley v. San Juan County, 89 Wn.2d 78, at page 83, 569 P.2d 712 (1977), is stated:

> "The SMA, RCW 90.58, though dealing with a limited area of the environment, i.e., the wetlands and adjacent uplands, is no less vigorous than SEPA in declaring a policy aimed at preservation of our natural resources. In fact, the permit system of the SMA is inextricably interrelated with and supplemented by the requirements of SEPA, Merkel v. Port of Brownsville, 8 Wn. App. 884, 850-51, 509 P.2d 390 (1973)."

In Merkel v. Port of Brownsville, at page 950, supra, is stated:

> "The question, therefore, is whether the port may take a single project and divide it

> into segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compels us to answer in the negative. (Emphasis added.)

In Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 556, 527 P.2d 1121 (1974), on an appeal of a Shorelines Board decision determining that a SMA permit be issued without conditions that the City of Seattle had demanded for its issuance when the trial court reinstated those conditions, this Court reviewed the Board's decision under RCW 34.04.130 (6) (e), which the Court has not done in this case even though no appeal was taken by the Commissioners. The Court overruled the court's decision by applying the "clearly erroneous test" to the evidence and in review of the evidence before the Board found no "mistake" of its determination of the protection of the environmental public interest of SMA by the Board having considered the environmental physical status of adjacent properties, giving "deference" to the Board's specialized knowledge and expertise as an administrative agency and determining a SMA permit be issued without that condition.

The Shorelines Board quasi-judicial findings and conclusions of March 23, 1978, were never subject to review by the Court to determine in a mandamus action the ultimate issue if whether the plat and proposed use of the private property by Lake Lawrence, Inc., complied with the platting statute, SEPA, SMA, and the master program as one consideration for determination if whether the mandamus order of the trial court should be reversed. The Board's findings and conclusions determined that ultimate fact not only by not having been appealed by the appellants but also as a matter of fact by their content. The Board reviewed the SEPA "proposed substantial development" (CP: 23, VI) for use of the property as being

in compliance with both the SEPA, SMA and the master program. The "proposed substantial development" was concluded to be "consistent" with SMA and the master program for the issuance of a SMA permit when conditioned on the SEPA limitations set forth in the "proposed substantial development" (in excess of the limitations of use of the master program regulations in the "Rural Environment" classification which the property had been zoned) to mitigate the specific SEPA adverse environmental impacts of the proposal as found by the Board on the environment of eagles (CP: 24, VII-IX). (CP: 26-27, III, IV, VI.) pursuant to RCW 90.58.140.

The Court by judicial fiat has authorized the Commissioners not to appeal the Board's decision and re-review "for purpose of reconsidering the plat proposal" (separate from SMA consideration), the Board's findings and conclusions and decision that were stipulated to be "contrary to and in conflict with" the prior findings, conclusions, and decision of the Board. Such action by the Commissioners was in direct conflict with RCW 34.04.130 (1) to adopt its own procedure not authorized by SEPA, SMA, the master program or the time limits for consideration of plat approval set forth in the platting statute (RCW 58.17.140).

What authorization does the Court have other than its own naked supreme power to invalidate the Board's findings, conclusions and decision by adopting those of the Commissioners carte blanche when they were adversary parties and chose not to appeal the Board's decision and thereby deny the respondents the right to a fair judicial hearing without the Commissioners having to prove in Court that they were authorized to do so? Does the mere existence of SEPA powers in public officials to approve a plat authorize them to abort the judicial procedural rights of an adversary party by out-of-court action? The review undertaken by the Court

was without due process of law when adopting the Commissioners findings, conclusions, and decision carte blanche without considering that the appellants had not appealed the Board's decision and without determining if whether or not the proposed substantial development complied with both the platting statute, SEPA, and SMA. The opinion authorized the Commissioners, contrary to the policies of SEPA, SMA, and the Master Program to make an ad hoc piecemeal determination of the jurisdiction of those acts having jurisdiction over the same subject matter which laws impose limitations of the use of private property to protect the environment and recognize at the same time the individual private rights of L.L., Inc., to equally use its private property areawide as that use enjoyed by its neighbors on the lake when in compliance with the limitations of those existting laws and regulations which the Commissioners ignored by using a plan as the basis of their authority.

3.2 Judicial Review, RCW 34.04.130, (6) (e), "clearly erroneous."

Assuming the Court because of its authority, which only it can decide, may void and make meaningless the authority of the Board, SEPA, SMA, the master program and the platting statute, and leave helpless the judicial rights of a private litigant, may it at the same time on de novo review ignore as a matter of judicial proof the "clearly erroneous test", mandated by statute, (RCW 34.04.130 (6) (e) when its previous opinions have stated the test requires broad review of the evidence in the record to determine if in fact whether private property was limited by governmental action pursuant to the policies of SEPA for the protection of the environment as well as the protection of individual rights to use private property? The Court, again, by judicial fiat when

adopting the Commissioners findings, conclusions, and decision by determining that they have independent, separate, SEPA authority to deny a plat and issuance of a SMA permit without being bound by those of the Board, has assumed without proof in court that they were as a matter of fact constitutionally exercising SEPA authority within the safeguards of the procedural and substantive limitations of SEPA authority in doing so, a dangerous assumption to make against individual rights to use private property when courts are the constitutional guardian of those rights from acts of public officials entrusted with powers of government that require proof in court and not out of court that they were exercising such powers delegated to them by existing law and not laws of their own making.

The Court did not make a broad de novo review of the evidence in the record to both determine as a matter of burden of proof of the Commissioners in fact in court if whether they were constitutionally exercising SEPA authority within the safeguards of SEPA procedural and substantive limitations or, instead, were not exercising such authority but authority of their own making arbitrarily and capriciously without due process of existing laws and regulations on an ad hoc, piecemeal, non areawide discriminatory basis on the lake, as is evidenced by the record which the Court did not review. The Court when assuming that the Commissioners exercised SEPA powers made a "clearly erroneous mistake" that they were exercising those powers within the safeguards of SEPA procedural and substantive limitations, when in fact they were not exercising SEPA authority but authority of their own making which a broad review of the evidence in the record reveals. On September 27, 1977, in May of 1978, and now as authorized by the Court in the future the primary basis of their authority was to preserve the private property from private use and

for the public use and purpose of protecting the status of eagles as "endangered birds", a status identified in the plan and not in the EIS documents, and to achieve the goals and policies of the plan and not of SEPA, and SMA, when the plan as stated in its forward is only a plan for future overall legislation and was not implemented areawide by any existing laws and regulations on the lake.

The statute mandates such broad review should have been undertaken: RCW 34.04.130 (6) (e): "clearly erroneous", (f): "arbitrary or capricious." Prior opinions in adversary proceedings have applied the test and cast the burden of proof on local government and public officials to show that they complied with the safeguards of procedural and substantive limitations of SEPA so that in employing the test a court will not make: ". . just a search for substantial evidence to support the administrative findings or decision.", as was done by the Court's partial review in this case.

> (Norway Hill v. King County Council, 87 Wn.2d 267, 273-274, 552 P.2d 674, (1976); Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 527 P.2d 1121, (1974); Bellevue v. Boundary Review Board, 90 Wn.2d 856, 867, 586 P.2d 470, (1978); Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978); RCW 34.04.130 (6) (e), (f); RCW 43.12C.060; Thurston County Ordinance No. 5172, A. Policies and Authority.)

In Polygon Corp. v. City of Seattle at pages 67, 68, and 69 in reference to the constitutional issue of fairness "clearly erroneous" test this court stated:

> "The appearance of fairness doctrine was first applied in Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969) to provide a

> due-process type standard for statutorily required hearings (Emphasis of Court) of a legislative body acting in a quasi-judicial capacity . . .
>
> ". . . The standard against which we test such allegations must be whether the allegations, if found to be true, demonstrate actual partiality precluding fair consideration of an application. (Citation omitted). That partiality would be present where it was probable that a denial was based on consideration outside the record, rather than on an evaluation of the EIS." (Emphasis added.)

In Polygon in reference to the application of the "clearly erroneous test" to determine if an environmental evaluation, identification of specific environmental impacts, and "alternatives" had been prepared and set forth in the EIS documents and that a non quasi-judicial SEPA discretionary decision had been exercised subject to the considerations of those matters contained in those documents:

> "We find it equally important that the same standard of review (i.e., "clearly erroneous") be available to a property owner whose property use has been limited by the denial of a building permit on the basis of SEPA. It has long been recognized that substantive and procedural safeguards are necessary to protect owners from abusive and arbitrary land use regulations. (Citing Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958); Chrobuck v. Snohomish County, 78 Wn.2d 858, 480 P.2d 489 (1971); Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969); Parkridge v. Seattle, 89 Wn.2d 454, 573 P.2d 359 (1978). While we indicated tnat specific protections developed in

> the zoning area are not applicable to a building permit denial, we recognize that the same potential for abuse exists. This is particularly true in view of the fact that environmental factors, especially those involving visual considerations, are not readily subject to standardization or quantification. That potential for abuse is even stronger where the decision must be made in a climate of intense political pressure." (Emphasis added.)

Set forth in the Brief of L.L., Inc., from pages 16 to 21 with references to the record is a statement of the Planning Department's preparation of the EIS statements. The EIS became final on May 18, 1977, and in reference to the identification of the environment of the eagle habitat on the site; the specific adverse environmental impacts that would be caused by the 24 lot plat subdivision and the proposal of L.L., Inc., and the "alternatives" the final comment of the Planning Department is contained in the final EIS, paraphrased as follows:

> ". . . . Except for the fact that the site is adjacent to water and therefore would attract some fishing birds and and mammals, this vegetation, habitat and wildlife is very common to western Washington. An inventory of species was not included because the habitat was judged not to be unique in the Pacific Northwest. . . .
>
> The experience of James Howton, consultant for the applicant, indicates that the osprey will continue to function near human habitation if nesting and roosting trees are available. This may not be true for bald eagles, . . . If these latter birds commonly used the site for nesting, or hunting on the lake, and could not continue this use after development of the site, we would

> conclude that a significant adverse impact would have occurred on the populations of these species occupying the general vicinity of Lawrence Lake.
>
> . . . .
>
> These qualities (wildlife habitat and beauty) could at least partially be retained even if development occurs, by strict preservation of vegetation in a natural state in a buffer around the shoreline and the south boundary of the property and by moving the location of the proposed dock from the marsh areas to the south. At this time, it is difficult to predict that these measures would be sufficient to prevent significant degradation for the above-mentioned bird species." (Emphasis added.) (CP: EX Book VII, Ex. 3(b) FEIS)

It is noted that the Department of Ecology made a response without critical comment to the 24 lot proposal of L.L., Inc.

The "alternative" of creating a 200 foot buffer free from human activity along the shoreline landward area (SMA "wetlands") and circling an area around all higher trees and snags on the site equivalent to their height was not an alternative set forth in the draft or final EIS statements but a proposed alternative of Commissioners in the hearing of April 24, 1978, in the event the court did not rule in their favor, outside the scope of environmental documentation. The EIS documents make no reference to eagles being "endangered birds" of Thurston County. The United States Department of Interior letter dated May 4, 1977, in comment to the draft EIS contained in the final EIS states:

> "We point out that every species is unique, by definition. It would be more accurate to state that no species are unique

to the site or that no known endangered or threatened species are present. This situation could change, however, inasmuch as the northern bald eagle is proposed for threatened status in Washington State." (Emphasis added.)

The findings, conclusions and decision of the Commissioners of May 30, 1978, were based either on statements contained in the comprehensive plan of findings of the Commissioners own making contrary to the mandate of SEPA set forth in RCW 43.21C.030. Portions of the Commissioners' decision (CP: 143-144) filed in court on May 31, 1978, where no reference is made to EIS documentation statements, read as follows:

"The decision of the Board issued April 24, 1978, stating that the preliminary plat of Wood Point should be denied for the following reasons:

1. In a policy statement in the Comprehensive Plan the County has identified eagles as a rare and endangered species; . . . . Therefore, a finding is made that the public interest is best served by assuring the continued use and availability of the Wood Point site for perching and feeding by eagles.

2. . . . . What is apparent from the record is how very little is known about eagles feeding and perching in the lakes in the State of Washington. And with respect to residential subdivisions, how much human activity is tolerated before the eagles leave the area, and finally what the cumulative effect is. That finding is that we simply do not have as much information as we would need.

3. Substantial testimony indicates that at Lake Lawrence, the eagles fly from the

> developed areas to this site and other undeveloped areas when disturbed.
>
> 4. . . . . Given the protected status of the eagles under the Comprehensive Plan and the acknowledged effect of residential development, the balance must be to assure the continued use by eagles. I find the assurance lacking and find the public interest would be best served by no development of this site until more is known about the importance of inland lakes on non-nesting eagles during both summer and winter." (Emphasis added.)

The Commissioners made 11 findings as to the environmental importance of the site for eagle habitat, none of which are set forth in the EIS document; except number "3", the importance of the site to local public interest. Nor are any of the 22 additional numbered findings set forth and identified in the EIS documents. (CP: 150-153). The only alternative determined by the Commissioners was not an alternative set forth in the environmental documents prepared by the planning department or a "responsible official" as required by SEPA mandate RCW 43.21C.030. In fact, the decision decided "no development" of the site should take place until "more is known" about eagles. Not contained in the May 21, 1978, filing of the findings, conclusions and decision of the Commissioners was a resolution in fact made by the Commissioners on April 24, 1978, that only in the event that the decision to be determined by the court was not in their favor would they approve the plat and issue a permit on drastic conditions not set forth as alternatives in the environmental documents. (See findings of trial court: 2.7, CP:121).

Further, the findings were the product of quasi-judicial "judges", not of a "responsible

official" as required by SEPA mandate, RCW 43.21C.060, when conducting an environmental investigation at the site on April 10, 1978, in the presence of protesting neighbors and a reporter without representatives of L.L. Inc., being notified of that investigation or being present and as the result of repetitious testimony of April 18, 1978, of objecting neighbors in a "climate of intense political pressures" while the Commissioners were adversary parties to judicial proceedings, alleging their individual liability which the Court's opinion now frees them from liability even though there has been no trial on those issues which the Court by its order reserved to its jurisdiction.

IV

ARBITRARY AND CAPRICIOUS EXERCISE OF POWERS

4.1 SEPA, SMA, Master Program rights vs. Comprehensive Plan.

A fundamental error of the opinion is that it does not recognize that an individual has any rights to use private property by subdividing land when the plat and proposal of use complies with existing policies of SEPA, SMA, and the areawide regulations of the SMA master program: defined by SMA as a "comprehensive use plan for a described area", and designed to protect the county and state public interest in the state's natural resources of shorelines and adjacent property, including wildlife, as well as the use of private property by regulations procedurally and substantively safeguarding "uncoordinated planning" and "piecemeal development" of a described area. (RCW 90.58.020; 90.58.030 (3) (b); 90.58.100).

The opinion authorizes the County and the Commissioners on September 28, 1977, April 24, 1978, and in the future, unbridled administrative

and quasi-judicial discretion in adjudicatory proceedings to deny the use of private property without due process of law by not complying with procedural and substantive safeguards of SEPA, SMA, and the master program regulations for the protection of the environment areawide on the lake. The Commissioners have been authorized by the opinion to employ a local plan, not an existing law or regulation, a tool only for future overall legislation not implemented by ordinances (opinion, page 3, 5, 13) to preserve the site for the public use and purpose of protecting "endangered birds" of Thurston County, on an ad hoc, non areawide, piecemeal, discriminatory basis when the environmental use of the land was already regulated areawide on the lake under the classification and identification of "Rural Environment" which the appellants have made efforts to change. The appellants have been granted an unlimited judicial license of tyranny over the use of private property by having been authorized in the past and being authorized in the future by unknown procedure to decide what plat or "configuration" and use proposal of private property will be approved to achieve the policies and goals of a nonexisting law or regulation, the plan, to preserve the site for "endangered birds, until more is known about them in Thurston County.

4.2 SMA, and Master Program.

In 1976 (one year prior to L.L., Inc.'s application) Thurston County adopted by legislation the master program as a product of following the comprehensive policies of SMA for:

> "coordinated planning" . . . "recognizing and protecting private property rights" . . . "prevent the inherent harm in an uncoordinated and piecemeal development of the

state's shorelines", and to protect "against adverse effects to . . . the land and its vegetation and wildlife. . ." (RCW: 90.58. 020). A policy statement of SMA provides that the master program shall first: "Recognize and protect the statewide interest over the local interest; . . .

Changes and adjustments to it are not to be made without approval of the Department of Ecology. RCW: 90.58.190. Violations are subject to criminal and civil penalties and relief. RCW: 90.58. 220, 230. Master program regulations were to be adopted by a scientific and systematic approach for the protection of the environment. RCW: 90.58.100. Its jurisdiction includes the "wetlands" 200 feet landward and the county is to adopt policies as to adjacent lands consistent with SMA policies. RCW: 90.58.030.

Eagles using the lake perch on trees of adjacent residential properties and also use the lake areawide for feeding, which the Board's findings and the Commissioners findings confirmed. (CP: 24, VII; CP: 144, "3"). The Board also made a finding on the status of the eagles of the lake and the importance of the site to their habitat. CP 24-25, VIII-IX.

It should, therefore, be judicially presumed that by adopting the master program and environmentally zoning the shorelines of the lake subject to different regulations by identifying approximately 2/3 "Rural Environment" and the remainder "Conservancy" that the master program regulations protected the county and the state public interest in the preservation of the habitat areawide on the lake and established uniform and equal rights to use property within each classification subject to the regulations of that classification. (Smith v. Skagit County, 75 Wn.2d 715, 624, 725, 453 P.2d 832 (1969).

Such areawide regulation of the shorelines property and adjacent properties is in direct conflict with the opinions' authorization of piecemeal jurisdiction within the site justifying the Commissioners authority to protect the habitat of eagles on the site beyond the 200 feet of "wetlands". And it is error to conclude that the function of the Board is "to directly regulate" the use of property (p. 10). It is, therefore, impossible to understand the Court's opinion when giving the plan, a tool for future legislation, the status of existing law when it was not implemented by any ordinances, and the status of eagles as "endangered birds" of the county was not contained in the preparation or content of any EIS documents, to disregard SEPA, SMA, and the master program areawide regulations and determine:

> "Contrary to respondents' contention, the Commissioners' request does not amount to an attempted rezone or spot-zone. It is in itself a zoning action. Nor does it create a classification different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan which governs here." Smith v. Skagit County, 75 Wn.2d 715, 743, 453 P.2d 832 (1969). (Opinion page 3; See also pages 4, 5, 10 and 13).

Smith v. Skagit County, supra, rejected spot-rezoning as being arbitrary and capricious when there was an areawide plan and zoning ordi-. nance.

4.3 Supremacy of Existing law, Exercise of authority without due process of law.

In United States v. Lee, 106 U.S. 196, 1 S. Ct. Rep. 240 (1882), issues arose if whether there had been a violation of the due process clause and

the "taking" clause of of [sic] the rights of private property when federal officials established a rule of their own making.

The Supreme Court stated:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of authority which it gives." (Emphasis added.)

The "spot rezone" cases are applicable to the same principles of the supremacy of existing laws for the protection of private rights to use private property when in compliance with existing laws and regulations. At least in the "spot rezone" cases local government was complying with the color of the law of legislation when here the Commissioners shocklingly disregarded SMA, SEPA, and the master program. (Shelton v. Bellevue, 73 Wn.2d 28, 435 P.2d 949, (1968); Smith v. Skagit County, 75 Wn.2d 715, 723-724, (1969); Parkridge v. Seattle, 89 Wn.2d 454, 459, 573 P.2d 359 (1978). The Court has subject rezone legislation because of its lack of uniform and equal limitations of use of private property to close judicial scrutiny as lending itself to being arbitrary, administrative, adjudicatory action on an ad hoc, piecemeal "spot zoning" basis, when there is in existence both an areawide plan and an areawide zoning ordinance implementing the plan. (Fleming v. Tacoma, 81 Wn.2d 292, 502 P.2d 327 (1972).

The Court's opinion does not escape the constitutional principles involved of the lack of fairness and equality, and the discriminatory actions of the Commissioners have had on the private use of property by L.L. Inc., when in compliance with existing laws and regulations. Nor does it escape the lack of fairness employed by the Commissioners outside of SEPA and SMA authority when as adversary parties and while not appealing the Board's decision, did:

> (a) Make an independent investigation in the presence of neighbors and the news media without notice or the presence of respondents or their representatives;
> (b) Conduct new hearings in a climate of "intense political pressure" by hearing repetitious evidence of objecting neighbors to any use of the private property by L.L., Inc.
> (c) Make new findings and conclusions on the same subject matter they previously had decided on September 28, 1977, based upon a non-SEPA investigation and hearings to circumvent and abort the need to appeal the Board's decision that they have now successfully accomplished by the Court's adoption of those findings, conclusions and decision.

This Court has confirmed relief by way of affirming mandamus relief in quasi-judicial or judicial proceedings when a party's proposed use of private property has complied with existing laws and regulations and unbridled discretionary action was employed in adjudication to deny the rights of use of private property based upon the wisdom of the "decision-maker" and not existing laws and regulations.

> (Ogden v. The City of Bellevue, 45 Wn.2d 492, 275 P.2d 899 (1944); Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958); Pierce v. King County, 62 Wn.2d 324, 335, 382 P.2d 628

(1963); Parkridge v. The City of Seattle, 89 Wn.2d 454, 573 P.2d 359 (1978); See also: Lund v. Tumwater, 2 Wn. App. 750, 472 P.2d 550 (1970). See also: Polygon Corp. v. Seattle, supra, Eastlake Com. Coun., v. Roanoke Assoc., Supra.)

The opinion holding the comprehensive plan of the County "governs" the use of the private property in lieu of existing laws and regulations with which an application is in compliance is in direct conflict with Sharinghouse v. Bellingham, 4 Wn. App. 198, 203, 480 P.2d 233 (1971).

(See also: Robinson v. Litz, 101 Az. 448, 420 P.2d 923 (1966); County of Maricopa v. Answood, Inc., 19 Az. App. 242, 506 P.2d 282 (1973); 112 A.2d 87 (1955); Youngblood v. Board of Sup'rs of San Diego Cty, 22 Cal. 3d 644, 586 P.2d 586 (1978); Great Western Sav. & Loan Assoc. v. Los Angeles, 31 Ca. App. 3d 403, 107 Ca. Rptr 359 (1973).

Every case cited in the opinion for the Court's authority is authority for the motion herein to be granted.

Respectfully submitted by Philip P. Malone, Atty. for Lake Lawrence, Inc.

s/
Philip P. Malone

APPENDIX A - RECORD
SUPREME COURT - APPELLANT'S
MOTION SUP. CT. FOR
PROHIBITION VS APPELLEE'S ACTION FOR CHANGING
ENVIRONMENT ZONING, 12/79

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC., Respondents, vs. THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT and MARJ YUNG, constituting the Board of Thurston County Commissioners and as individuals, Appellants, vs. LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK, Intervenors.	NO. 45816 NOTICE OF HEARING ON MOTION APPLICATION AND AFFIDAVIT OF LAKE LAWRENCE, INC., FOR A WRIT OF PROHIBITON AGAINST ART O'NEAL, THE DIRECTOR OF THURSTON COUNTY PLANNING DEPARTMENT, THE COMMISSIONERS, INDIVIDUALLY AND AS A BOARD

TO: Art O'Neal, director, Thurston County Planning Department
George Barner, Jr., Commissioner;
Del Petit, Commissioner;
Board of Thurston County Commissioners;

Counsel of Record:
J. Lawrence Coniff, Jr.
Thomas Brucker
Alexander Mackie

NOTICE IS HEREBY GIVEN that there shall come on for hearing at 1:30 o'clock p.m. on the 13th day of December, 1979 or as soon thereafter as the matter may be heard, before Supreme Ct. Commissioner of the above-entitled court the: "Motion, Application and Affidavit of Lake Lawrence, Inc., For a Writ of Prohibition Against Art O'Neal, The Director of Thurston County Planning Department, The commissioners Individually, And As a Board", a copy of which is attached and served with this notice upon you.

DATED this 28th day of November, 1979.

s/ _____
Lawrence, Inc.

Appellant's Motion Sup.Ct.
For Prohibition vs Appellee's
Action for Changing
Environment Zoning, 12/79

NO. 45816

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC.,
Respondents,
vs.
THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT and MARJ YUNG constituting the Board of Thurston County Commissioners and as individuals,
Appellants,
vs.
LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK,
Intervenors.

MOTION, APPLICATION AND AFFIDAVIT OF LAKE LAWRENCE, INC., FOR A WRIT OF PROHIBITION AGAINST ART O'NEAL, THE DIRECTOR OF THURSTON COUNTY PLANNING DEPARTMENT, THE COMMISIONERS INDIVIDUALLY AND AS A BOARD

153 1st Street
P.O. Box 443
Poulsbo, Washington 98370
Telephone: (206) 779-5518

Philip P. Malone
Attorney for Lake Lawrence, Inc.

MOTION AND APPLICATION is hereby made by Lake Lawrence, Inc., pursuant to Chapter 7.16, Prohibition, and RAP 7.3, for a time setting hearing and on hearing, an order by the Court for the issuance of a peremptory writ of prohibition to the Thurston County Planning Director, Art O'Neal, the Commissioners, George Barner, Jr. and Del Petit and the Board of County Commissioners (parties appellant in the above-entitled action), to cease and desist from environmentally "spot" rezoning the private leasehold estate of the land of the respondent from its present designated classification as "Rural Environment" to a more limited use as "Conservancy Environment" under the Thurston County Master Program regulations adopted by the county in 1976 pursuant to its authority under the Shorelines Management Act of 1971. (Chapter 90.58). This motion is made on the records and files now under review by the Court subject to a Motion For Reconsideration by the respondent of the opinion of the Court filed October 4, 1979 and the affidavit to this motion. The term for which the prohibition is made is requested to continue until the Court has decided the Motion For Reconsideration of the respondent and thereafter until the respondent has exhausted its remedies for obtaining relief from the United States Supreme Court.

Dated this 28th day of November, 1979.

s/
Philip P. Malone, Counsel
for Lake Lawrence, Inc.

AFFIDAVIT OF COUNSEL FOR LAKE LAWRENCE, INC.,
IN SUPPORT OF MOTION AND APPLICATION
FOR A WRIT OF PROHIBITION

STATE OF WASHINGTON)
: ss.
COUNTY OF KITSAP)

PHILIP P. MALONE having been first duly sworn on oath, states he is the counsel for Lake Lawrence, Inc., and makes this affidavit in support of the application for a hearing and a peremptory writ of prohibition against the planning director of the Planning Department of Thurston County, the Commissioners individually and as a Board of Thurston County.

1. Previous Writ of Prohibition:

On October 27, 1977, the respondent's attorney appeared and, on hearing, an order was made by Judge Hewitt Henry granting an alternative writ of prohibition against the appellants including Art O'Neal, Director of the Thurston County Regional Planning Commission, the Commissioners, Del Petit and George Barner, Jr., and the Board, and an order to show cause for hearing was set on November 14, 1977. (CP: 8). The petition and affidavits for such alternative writ of prohibition is set forth in the Clerk's Papers. (CP: 1-7). Minute entry was made of the hearing of November 14, 1977, granting the temporary writ and a review as a matter of certiorari by the Honorable Hewitt A. Henry of the Superior Court of Thurston County. (CP: 12). Subsequently the writs were prepared, signed by counsel, and approved for entry, but remained unfiled and unsigned. (CP: 158-159, 160-162).

2. Action of Board of Commissioners and Art O'Neal, Thurston County Planning Director:

On the 5th day of November, 1979, Art O'Neal, as the "responsible official" under the State Environmental Policy Act (RCW 43.21C.060) has made upon the application of the Board of Thurston County Commissioners a "threshold determination" to redesignate the classification of the "Shoreline Area" (RCW 90.58.030 (2) (d) (f) of the private leashold estate of the applicant from "Rural Environment" to "conservancy Environment" of the boundaries of the private leasehold estate of the applicant under the Thurston County Master Program Regulations adopted by the county in 1976 pursuant to the Shorelines Management Act of 1971 without consideration of an equal non-discriminatory area-wide change in the boundaries of other property adjacent to the property of the applicant environmentally zoned "Rural Environment".

3. Previous Judicial Action and Subject Matter of Reconsideration and Petition for Certiorari to United States Supreme Court:

The Court on the 17th day of November, 1978, has stayed any relief to which the respondent would be entitled pursuant to an order entitled: "Order; Accepting Certification and Continuing Stay Order" from the Circuit Court of Appeals which had stayed action of the superior court. (CP: 133; CP: 127; 132). Therefore, the respondent is left helpless to obtain judicial relief prohibiting the actions of the appellants pending exhaustion of its remedies in this Court and the Supreme Court of the United States which are part of the subject matter for which it has been alleged that the previous similar actions of the appellants were without jurisdiction and lawful authority, being unfair, unequal and discriminatory, by environmentally "spot rezoning" a particular piece of property on

an ad hoc, piecemeal basis contrary to the policies of SMA and in violation of the personal rights of the respondent set forth in Article 1, Section 3 and 12 of the state of Washington Constitution and the 5th and 14th Amendment of the United States Constitution.

4. "Vested Rights":

Pursuant to the authority of opinions of this Court a person is entitled to the rights of use of private property established by laws and regulations limiting the use of private property existing at the time an application for use was made subject to the application of use being in compliance with those existing laws and regulations. While the opinion of this court has not addressed that issue in its opinion and which is set forth in the Brief of Lake Lawrence, Inc., and its Motion For Reconsideration, it is of the opinion of counsel that regardless of the opinion of the Court to the contrary that the Shorelines Hearings Board's findings and conclusions finally determined that the applications made by the respondent were in compliance with the platting statute (RCW Chapter 58.17), SEPA (Chapter 43.21C), SMA (Chapter 90.58) and the area-wide regulations of the Thurston County Master Program by providing for a conditioned issuance of the shorelines permit to mitigate the adverse impact to bald-headed eagles in compliance with SEPA policies and EIS documents in excess of Master Program limitations. The court's opinion in reversing the mandamus order of the Superior Court ordering the Commissioners to approve the preliminary plat and shorelines permits in effect has left the respondent helpless and without any adequate remedy at law against the Commissioners, individually and as a board, and the Director of Regional Planning, Art O'Neal, from limiting the use by the petitioner of its private property to whatever their wisdom may desire by

environmentally rezoning the land under the Master Program. The only remedy the respondent now has left is the Court's consideration of the Motion For Reconsideration and a petition to the Supreme Court for a Writ of Certiorari, which is further jeopardized if the property is "environmentally spot rezoned" during the pendency of those proceedings and the county later again refuses to grant and issue approval of the preliminary plant and shorelines environmental permits for which the respondent applied, on the basis that such use is then further limited by the more stringent regulations under a "Conservancy Environment" classification and change of boundaries of the "shorelines area". (See Motion For Reconsideration of Lake Lawrence, Inc.)

5. Jurisdiction of Court and Compliance with Chapter 7.16 (Prohibition):

The application is made upon the grounds above-stated in compliance with RCW 7.16.300 Grounds for granting writ- Affidavit. The form of procedure for application of the writ is in compliance with RCW 7.16.310 Alternative or peremptory writs- Form. The writs may be issued by this Court and returnable for hearing and a hearing at any time set by the court. RCW 71.61330. The Rules On Appeal have not superseaded [sic] the procedure and remedy of the statute as they have in a prohibition action against a state officer. (RAP 16.2; RCW 7.56). In addition the Court has jurisdiction under RAP 7.3 providing: "The appellate court has the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case."

6. References:

Attached to the affidavit for reference are copies of the following for the Court's consideration:

(a) Declaration of Significance, dated November 5, 1979 of Thurston County on application by the Board of Commissioners and by the "responsible official", Art O'Neal;

(b) Copy of Maps of Thurston County Master Program of Lake and surrounding property showing shorelines boundaries designated as "Rural" or "Conservancy".

s/ _____

SUBSCRIBED AND SWORN to before me this 28th day of November, 1979.

s/ _____
Notary Public in and for the State of Washington, residing at Poulsbo

T-803
SH-TCO-27-79

DECLARATION OF SIGNIFICANCE

Jurisdiction: Thurston County Olympia Lacey

This proposal has been determined to have a significant adverse impact upon the environment. An Environmental Impact Statement is required under RCW 43.21C.030(2)(C). This decision was made after review by the Lead Agency of a completed Environmental Checklist and other information on file with the Lead Agency.

Description of Proposal: Redesignation of shore line Area from Rural to Conservancy designation in Thurston County Shoreline Master Program

Applicant: Board of Thurston County Commissioners

Location of Proposal: End of Pleasant Beach Drive on south side of Lake Lawrence

Lead Agency: Thurston County Planning Department

Responsible Official Art O'Neal

Title Director, Thurston County Planning Department

Date November 5, 1979 Signature s/

Copies sent to:

Department of Natural Resources,
Attn: Arden Olsen

Department of Game

Department of Fisheries

U.S. Fish and Wildlife Service

DOE, Environmental Review Section

Sandy Mackie

File #SH-TCO-27-79

sjo

APPENDIX A - RECORD

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC., Respondents, v. THURSTON COUNTY, GEORGE BARNER, JR.; et al., Appellants, LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, et. al., Respondents/Cross-Appellants.	No. 45816 ORDER DENYING APPLICATION FOR WRIT OF PROHIBITION

This matter came before the chief Justice on December 13, 1979 on the motion of Lake Lawrence Inc., joined in by the State of Washington Department of Natural Resources, for a writ of prohibition, seeking to preclude Thurston County from taking certain actions during the pendency of motions for reconsideration of this court's decision filed on October 4, 1979 (92 Wn.2d 656, ___ P.2d ___), and also during the pendency of any efforts which may subsequently be made to obtain further review by the United State Supreme Court.

Having reviewed the pleadings and heard oral argument by telephone conference call, the Chief Justice finds that there is no basis for a writ of prohibition on the facts presented, that the petitioners appear to be adequately protected by a superior court order which will remain in effect

until this court issues its mandate, and that RAP 12.6 limits the authority which this court will exercise when review is sought by the United States Supreme Court.

The application for a writ of prohibition is denied.

DATED at Olympia, Washington this 13th day of December, 1979.

s/ _____
CHIEF JUSTICE

APPENDIX A - RECORD

THE SUPREME COURT OF WASHINGTON

THE DEPARTMENT OF NATURAL RESOURCES, ET AL,

Respondents,

v.

THURSTON COUNTY, ET AL,

Appellants.

No. 45816

ORDER

DENYING MOTIONS FOR RECONSIDERATION

The Court having unanimously decided that the respondents' motions for reconsideration should be denied,

It is ordered that the motions be and they hereby are denied.

Dated this 20th day of February, 1980.

s/ _____
Chief Justice

92 Wn.2d 656

APPENDIX A - RECORD

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC., Respondents, v. LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, THURSTON COUNTY BOARD OF COUNTY COMMISSIONERS, Respondents/ Cross-Apellants.	MANDATE No. 45816 THURSTON County No. 58623 & 59975 COURT OF APPEALS NO. 3662-II

The State of Washington to: The Superior Court of the State of Washington in and for THURSTON County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on October 4, 1979, became the decision terminating review of this court in the above entitled case on February 20, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:

$147.57 in favor of Thurston County, George Barner, Jr., Del Pettit and Marj Young, appellants, and $74.62 in favor of the Lake Lawrence Public Lands Protection Association, et al, intervening appellants, and against respondents.

An Order Denying Motion for Reconsideration was entered in the above case on February 20, 1980; copy attached.

cc:
Owens, Weaver, Davies & Dominick
Alexander W. Mackie, Sp. Dpty.
Hon. Patrick D. Sutherland, Pros. Atty.
Richard A. Strophy, Deputy
Hon. Slade Gorton, Atty General
J. Lawrence Coniff, Asst
Charles B. Roe, Asst.
Robert V. Jensen, Asst.
Philip P. Malone
Smith, Brucker, Winn & Ehlert
Thomas H. S. Brucker
Roger M. Leed
Reporter of Decisions
Court of Appeals,
Division II

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 25th day of February A.D. 1980

s/ DEPUTY
for JOHN J. CHAMPAGNE
Clerk of the Supreme Court, State of Washington

SUPERIOR COURT OF THE STATE OF WASHINGTON

For the Counties of
Island and San Juan

HOWARD A. PATRICK
Judge

CAROL K. GLOVER
Court Administrator

March 19, 1980

RICHARD L. PITT
Judge

Coupeville, WA 98239
Friday Harbor, WA 98250

Alexander W. Mackie
Owens, Weaver,
Davies & Dominick
926 - 24th Way SW
Olympia, WA 98502

Philip P. Malone
Attorney at Law
PO Box 443
Poulsbo, WA 98370

J. Lawrence Coniff
Assistant Attorney General
Temple of Justice
Olympia, WA 98504

Thomas Brucker
Attorney at Law
1411 Fourth Ave. Bldg.
Seattle, WA 98101

RE: State, et al vs. Thurston County, et al,
Cause No. 59975 and 58623.

Gentlemen:

The hearing on presentation of the Judgment has been set for argument on March 25th. In view of the Supreme Court's decision there seems to be no question of the appropriatness of the Judgment. I would suggest that if there is objection to the form of the Judgment, to avoid additional expense that you send your objections in writing.

Sincerely,

s/
RICHARD L. PITT

RLP/bsm

Copy mailed to all counsel of
record this 14th day of March, 1980
s/
Julie A. Aarts

APPENDIX A - RECORD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, and LAKE LAWRENCE, INC., a Washington corporation, Petitioners, vs. THURSTON COUNTY, at al., Respondents, and ROY HARRISON, et al., Intervenors.	CONSOLIDATED CAUSE NOS. 59975 and 58623 JUDGMENT

THIS MATTER, having come on before the court upon motion of defendant Thurston County to dismiss the writs of mandamus and certiorari, and the court being fully advised thereof, now therefore, be it hereby ORDERED, ADJUDGED AND DECREED:

1. That the decision of the Board of Thurston County Commissioners, in denying the plat of Wood Point, be and hereby is affirmed.

2. That the action for mandamus and damages filed by petitioners herein, be and hereby is dismissed with prejudice.

3. That defendants and intervenors be awarded their costs and fees as provided by statute, including RCW 58.17.180, and as allowed by the Supreme Court of Washington.

ENTERED IN OPEN COURT this
2 day of April, 1980

s/
Judge Richard L. Pitt

Presented by:

PATRICK D. SUTHERLAND,
Prosecuting Attorney

s/
Alexander W. Mackie
Special Deputy Prosecuting Attorney
Attorneys for Defendant Thurston County

Judgment

APPENDIX A - RECORD

SUPREME CT.: NO. 45816
CT. OF APPEALS: NO. 3662-II
THURSTON COUNTY SUPERIOR CT: NO. 58623
59975

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LAKE LAWRENCE, INC., ET AL., Petitioner and Appellee, v. THURSTON COUNTY AND ITS COUNTY COMMISSIONERS, INDIVIDUALLY AND AS A BOARD, ET AL., Respondents and Appellants.	NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Lake Lawrence, Inc., a Washington corporation, the Petitioner and Appellee in the above-entitled case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington reversing the judgment of the Superior Court filed in favor of appellants, Thurston County, et al., on October 4, 1979; denial of appellee's motion for reconsideration of the appellee, entered on February 20, 1980, terminating the review of the Supreme Court of the State of Washington by mandate. Copies of the Supreme Court's judgment (92 Wn.2d 656 (1979);[sic] the denying of motion, and mandate are attached.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2). Dated: May 13, 1980; Filed with the Supreme Court, May 13, 1980.

LAKE LAWRENCE, INC.

BY: s/_____

PHILIP P. MALONE,
its attorney
PO Box 443, 153 1st Street
Poulsbo, WA 98370

SUPREME CT.: NO. 45816
CT. OF APPEALS: NO. 3662-II
THURSTON COUNTY SUPERIOR CT: NO. 58623
59975

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LAKE LAWRENCE, INC., ET AL., Petitioner and Appellee, v. THURSTON COUNTY AND ITS COUNTY COMMISSIONERS, INDIVIDUALLY AND AS A BOARD, ET AL., Respondents and Appellants.	CERTIFICATE OF SERVICE OF NOTICE OF APPEAL

STATE OF WASHINGTON)
: ss.
COUNTY OF KITSAP)

PHILIP P. MALONE, being first duly sworn on oath, deposes and says: That he is duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States and hereby certifies that he caused to be served by delivery on May 13, 1980 to the Clerk of the Supreme Court of the State of Washington a Notice of Appeal to the Supreme Court of the United States and that he caused to be mailed a true and correct copy thereof with postage thereon fully prepaid in the United States Mail at Poulsbo, Washington, addressed as follows to the attorneys of record herein:

Mr. Roger M. Leed, Attorney at Law,
1411 Fourth Avenue, Suite 610,
Seattle, Washington 98101:

Mr. Thomas Brucker, Smith, Brucker, Winn & Ehlert,
Attorneys at Law, 1411 Fourth Avenue,
Seattle, Wa. 98101;

Hon. Patrick D. Sutherland, Prosecuting Attorney;
Richard A. Strophy, Deputy,
Thurston County Courthouse, Olympia, Wa. 98502;

Hon. Slade Gorton, Attorney General;
Mr. J. Lawrence Coniff, Asst.,
Temple of Justice, Olympia, Washington 98504;

Mr. Charles Roe,
Mr. Robert Jensen, Asst. Attorney General
Temple of Justice, Olympia, Wa. 98504;

Mr. Alexander W. Mackie,
926 - 24th Way S.W., Olympia, Wa. 98502

s/
Philip P. Malone

SUBSCRIBED AND SWORN to before me this
13th day of May, 1980.

s/
Notary Public in and for
the State of Washington,
residing at Poulsbo

APPENDIX B

STATE STATUTES: REVISED CODE OF WASHINGTON, (RCW)

CHAPTER 7.16
CERTIORARI, MANDAMUS AND PROHIBITION

7.16.150 Mandamus defined. The writ of mandamus may be denominated a writ of mandate.

7.16.160 Grounds for granting writ. It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

7.16.170 Absence of remedy at law required-Affidavit. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested.

7.16.180 Alternative or peremptory writs-Form. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in some similar form, except the words requiring the party to show cause why he has not done as commanded must be omitted and return [day] inserted.

7.16.190 Notice of application-No default. When the application to the court is made without notice

to the party, and the writ be allowed, the alternative must be first issued; and if the application be upon due notice and the writ be allowed, the peremptory writ may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

7.16.200 Answer. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action.

7.16.210 Questions of fact, how determined. If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the appellant may have sustained, in case they find for him.

7.16.220 Applicant may demur to answer or countervail it by proof. On the trial the applicant is not precluded by the answer from any valid objections to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.

7.16.250 Hearing. If no answer be made, the case must be heard on the papers of the applicant. If

the answer raises only questions of law, or puts in issue immaterial statements not affecting the substantial rights of the party, the court must proceed to hear or fix a day for hearing the argument of the case.

7.16.260 Judgment for damages and costs-Peremptory mandate. If judgment be given for the applicant he may recover the damages which he has sustained, as found by the jury or as may be determined by the court or referee, upon a reference to be ordered, together with costs: and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay.

7.16.290 Prohibition defined. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

7.16.300 Grounds for granting writ-Affidavit. It may be issued by any court, except police or justices' courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

7.16.310 Alternative or peremptory writs-Form. The writ must be either alternative or peremptory. The alternative writ must state generally the allegations against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein until the further order of the court from which it is issued, and to show cause before such court, as a specified time and place, why such party should not be absolutely restrained

from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

CHAPTER 8.08
EMINENT DOMAIN BY COUNTIES

8.08.010 Condemnation authorized for general county purposes-Petition. Every county is hereby authorized and empowered to condemn land and property within the county for public use; whenever the board of county commissioners deems is necessary for county purposes to acquire such land, real estate, premises or other property, and is unable to agree with the owner or owners thereof for its purchase, it shall be the duty of the prosecuting attorney to present to the superior court of the county in which said land, real estate, premises, or other property so sought to be acquired or appropriated shall be situated, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money to such owner or owners respectively, and to all tenants, encumbrancers, or others interested, for taking such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made as aforesaid be ascertained or determined by the court or the judge thereof.

8.08.020 Public use declared. Any condemnation, appropriation, or disposition intended in RCW 8.08.010 through 8.08.080 shall be deemed and held to be for a county purpose and public within the meaning of RCW 8.08.010 through 8.08.080 when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof.

8.08.040 Hearing-Order adjudicating public use. At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition have been duly served with said notice as prescribed herein, and shall be further satisfied by competent proof that the contemplated use for which the lands, real estate, premises, or other property sought to be appropriated is a public use of the county, the court or judge thereof may make and enter an order adjudicating that the contemplated use is really a public use of the county, and which order shall be final unless review thereof to the supreme court or the court of appeals be taken within five days after entry of such order, adjudicating that the contemplated use for which the lands, real estate, premises or other property sought to be appropriated is really a public use of the county, and directing that determination be had of the compensation and damages to be paid all parties interested in the land, real estate, premises, or other property sought to be appropriated for the taking and appropriation thereof, together with the injury, if any, caused by such taking or appropriation to the remainder of the lands, real estate, premises, or other property from which the same is to be taken and appropriated, after offsetting against any and all such compensation and damages,

special benefits, if any, accruing to such remainder by reason of such appropriation and use by the county of such lands, real estate, premises and other property described in the petition; such determination to be made by a jury, unless waived, in which event the compensation or damages shall be determined by the court without a jury. [Amended by Laws 1971 ch 81 § 37, effective March 23, 1971.]

CHAPTER 34.04
ADMINISTRATIVE PROCEDURE

34.04.010 Definitions. For the purpose of this chapter: (1) "Agency" means any state board, commission, department or office authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

34.04.022 Uniform procedural rules-Application. On or before July 1, 1967, the code reviser shall add to Title 1 or the Washington Administrative Code a new chapter to be known as chapter 1-08 WAC Uniform Procedural Rules, which shall become effective July 1, 1967, and shall govern the administrative practice and procedure in and before all agencies which have not adopted comprehensive rules of practice and procedure prior to that date. Except for the numbering thereof, such rules shall be identified with the rules contained in WAC 308-08-101 through 308-08-590 as the same existed on January 3, 1966: Provided, That in publishing chapter 1-08 WAC the reviser may revise such terms as are used in chapter 308-08 WAC to describe "agency", "department", "board", "commission", and like terms, so as to enable the use of such rules by mulitple agencies.

This section shall not prohibit any such agency from hereafter adopting its own rules of practice and procedure in the manner provided by this

chapter if such agency shall elect to promulgate comprehensive rules on this subject and shall, in the order of adoption, expressly negative any further applicability to such agency of the rules contained in chapter 1-08 WAC. [Added by Laws 1967 ch 237 § 12, effective July 1, 1967.]

34.04.090 Contested cases-Notice-Hearing-Record-Informal disposition-Record-Finding of fact-Agency's powers.

(1) In any contested case all parties shall be afforded an opportunity for hearing after not less than twenty days' notice: but no hearing shall be required until the hearing is damanded unless other statutory provisions or agency rules provide otherwise. The notice shall include:

(a) a statement of the time, place and nature of the proceeding;

(b) a statement of the legal authority and jurisdiction under which the hearing is to be held:

(c) a reference to the particular sections of the statutes and rules involved;

(d) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon request a more definite and detailed statement shall be furnished.

(2) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(3) Unless precluded by law, informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default.

(4) The record in a contested case shall include:

(a) all pleadings, motions, intermediate rulings;

(b) evidence received or considered;

(c) a statement of matters officially noticed;

(d) questions and offers of proof, objections, and ruling theron;

(e) proposed findings and exceptions;

(f) any decision, opinion, or report by the officer presiding at the hearing;

(5) Oral proceedings shall be transcribed for the purpose of agency decision pursuant to RCW 34.04.110, as now or hereafter amended, rehearing, or court review. A copy of the record or any part thereof shall be transcribed and furnished to any party to the hearing upon request therefor and payment of the reasonable costs thereof.

(6) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(7) Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

(8) Agencies, or their authorized agents, may

(a) administer oaths and iffirmations, examine witnesses, and receive evidence, and no person shall be compelled to divulge information which he could not be compelled to divulge in a court of law,

(b) issue subpoenas as provided in RCW 34.04.105,

(c) rule upon offers of proof and receive relevant evidence,

(d) take or cause depositions to be taken prusuant to rules promulgated by the agency, and no person shall be compelled to divulge information which he could not be compelled to divulge by deposition in connection with a court proceeding,

(e) regulate the course of the hearing,

(f) hold conferences for the settlement or simplification of the issues by consent of the parties,

(g) dispose of procedural request or similar matters,

(h) make decisions or proposals for decisions pursuant to RCW 34.04.110,

(i) take any other action authorized by agency rule consistent with this chapter.

34.04.100 Contested cases-Rules of evidence-Cross examination. In contested cases:

(1) Agencies, or their authorized agents, may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(2) All evidence, including but not limited to records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(4) Agencies, or their authorized agents, may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies, or their authorized agents, may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

34.04.120 Contested cases-Adverse decisions and orders-Findings and conclusions. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of each fact found upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed to each party and to his attorney of record, if any. [Amended by Laws 1975 ch 12 § 1.]

34.04.130 Contested cases-Judicial review.

(1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof only under the provisions of this 1967 amendatory act, and such person may not use any other procedure to obtain judicial review of a final decision, even though another procedure is provided elsewhere by a special statute or a statute of general application. Where the agency's rules provide a procedure for rehearing or reconsideration, and that procedure has been invoked, the agency decision shall not be final until the agency shall have acted thereon.

(c) Proceedings for review under this chapter shall be instituted by filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located. The petition shall be served and filed within thirty days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency and all parties of

record. If a timely petition is filed any party of record not filing or joining in the first petition who wants relief from the decision must join in the petition or serve and file a cross-petition within twenty days after service of the first petition or thirty days after service of the final decision of the agency, whichever period of time is longer. The court, in its discretion, may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the agency decision. Where other statutes provide for stay or supersedeas of an agency decision, it may be stayed by the agency or the reviewing court only as provided therein; otherwise the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within thirty days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency: or

(c) made upon unlawful procedure: or

(d) affected by other error of law; or

(e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or

(f) arbitrary or capricious. [Amended by Laws 1967 ch 237 § 6, effective July 1, 1977; Laws 1st Ex Sess 1977 ch 52 § 1.]

CHAPTER 43.21C
STATE ENVIRONMENTAL POLICY ACT

43.21C.010 Purposes: The purposes of this chapter are:
(1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation. [Enacted Laws 1st Ex Sess 1971 ch 109 §1.]

43.21C.030 Guidelines for state agencies, local governments-Statements-Reports-Advice-Information The legislature authorizes and directs that, to the fullest extent possible:

(1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this act, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment:

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations:

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action:

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented:

(iii) alternatives to the proposed action:

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity: and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of

ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

43.21C.040 Examination of laws, regulations, policies by state agencies and local authorities-Report of deficiencies and corrective measures. All branches of government of this state, including state agencies, municipal and public corporations, and counties shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this act and shall propose to the governor not later than January 1, 1972, such measures as may be necessary to bring their authority and policies in conformity with the intent, purposes, and procedures set forth in this chapter. [Enacted Laws 1st Ex Sess 1971 ch 109 §4.]

43.21C.050 Specific statutory obligations not affected. Nothing in RCW 43.21C.030 or 43.21C.040 shall in any way affect the specific statutory obligations of any agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other public agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other public agency. [Enacted Laws 1st Ex Sess 1971 ch 109 § 5.]

43.21C.060 Chapter supplementary. The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state,

including state agencies, municipal and public corporations, and counties: Provided, however, That any governmental action, not requiring a legislative decision, may be conditioned or denied pursuant to this chapter only on the basis of specific adverse environmental impacts which are both identified in the environmental documents prepared pursuant to the chapter and stated in writing by the responsible official of the acting government agency. In the case of counties with a population of more than seventy thousand people and cities with a population of more that thirty-seven thousand people, such conditions or denials made more than one year from September 21, 1977, shall also be based upon policies developed by the appropriate local governmental authority and incorporated into resolutions, regulations, ordinances, plans or codes. In the case of counties with a population of less than seventy thousand people and cities with a population of less than thirty-seven thousand people, such conditions or denials made more than three years from September 21, 1977 shall also be based upon policies developed by the appropriate local governmental authority, and incorporated into resolutions, regulations, ordinances, plans, or codes: Provided, further, That, except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency. [Enacted Laws 1st Ex Sess 1971 ch 109 § 6: Amended by Laws 1st Ex Sess 1977 ch 278 § 2.]

43.21C.100 Council on environmental policy-Established-Composition-Abolishment. There is hereby

established the council on environmental policy which shall be composed of the members of the polluion control hearings board.

The council shall be abolished and shall cease to exist at midnight, June 30, 1976. The guidelines established by the council prior to midnight, June 30, 1976, shall continue to be valid and of force and effect, except as they are thereafter amended by further guidelines promulgated by the department of ecology, in accord with chapter 34.04 RCW.

Upon the abolishment of the council on June 30, 1976, all powers, duties, and functions of the council are transferred to the department of ecology. [Added by Laws 1st Ex Sess 1974 ch 179 § 4, effective May 5, 1974.]

43.21C.110 Council on environmental policy-Powers, duties and function.
It shall be the duty and function of the council:

(1) To adopt initially and amend thereafter rules of interpretaion and implementation of this chapter (the state environmental policy act of 1971), subject to the requirements of chapter 34.04 RCW for the purpose of providing guidelines to all branches of government including state agencies, political subdivisions, public and municipal corporations, and counties. The rule making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter (the state environmental policy act of 1971):

(a) Categories of governmental actions which normally are to be considered as potential major actions significantly affecting the quality of the environment as well as categories of actions exempt from such classification, including categories pertaining to applications for water right permits pursuant to chapters 90.03 and 90.44 RCW.

(b) Criteria and procedures applicable to the determination of when an act of a branch of government is a major action significantly affecting the quality of the environment for which a detailed statement is required to be prepared pursuant to RCW 43.21C.030.

(c) Procedures applicable to the preparation of detailed statements, including but not limited to obtaining comments, data and other information, and providing for and determining areas of public participation.

(d) Scope of coverage and contents of detailed statements assuring that such statements are simple, uniform, and as short as practicable.

(e) Procedures for public notification of actions taken and documents prepared.

(f) Definition of terms relevant to the implementation of this chapter.

(g) Guidelines for determining the obligations and powers under this chapter of two or more branches of government involved in the same project significantly affecting the quality of the environment.

(h) Methods to assure adequate public awareness of the preparation and issuance of detailed statements required by RCW 43.21C.030(2)(c).

(i) To prepare guidelines for projects setting forth the time limits within which the governmental entity responsible for the action shall comply with the provisions of this chapter.

(j) Guidelines for utilization of a detailed statement for more than one action.

(k) Guidelines relating to actions which shall be exempt from the provisions of this chapter in situations of emergency.

(2) In exercising its powers, functions, and duties under this section, the council may:

(a) Consult with the state agencies and with representatives of science, industry, agriculture, labor, conservation orgainizations, state and local governments and other groups, as it deems advisable: and

(b) Utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies, orgainzations and individuals, in order to avoid duplication of effort and expense, overlap, or conflict with similar activities authorized by law and performed by established agencies.

(3) Rules adopted pursuant to this section shall be subject to the review procedures of RCW 34.04.070 and 34.04.080. [Added by Laws 1st Ex Sess 1974 ch 179 § 6, effective May 5, 1974.]

43.21C.120 Rules, ordinances, resolutions and regulations-Adoption-Effective Dates.

(1) All agencies of government of this state are directed, consistent with rules and guidelines adopted under RCW 43.21C.110, to adopt rules pertaining to the integration of the policies and procedures of this chapter (the state environmental policy act of 1971), into the various programs under their jurisdiction for implementation. Adoption of the initial rules required under this section shall take place not later than one hundred twenty days after the effective date of rules and guidelines adopted pursuant to RCW 43.21C.110.

(2) Rules adopted by state agencies under subsection (1) of this section shall be adopted in accordance with the provisions of chapter 34.04 RCW and shall be subject to the review procedures of RCW 34.04.070 and 34.04.080.

(3) All public and municipal corporations, political subdivisions, and counties of this state are directed, consistent with rules and guidelines adopted under RCW 43.21C.110, to adopt rules, ordinances, or resolutions pertaining to the integration of the policies and procedures of this chapter (the state environmental policy act of 1971), into the various programs under their

jurisdiction for implementation. Adoption of the initial rules required under this section shall take place not later than one hundred eighty days after the effective date of rules and guidelines adopted pursuant to RCW 43.21C.110.

(4) Ordinances or regulations adopted prior to the effective date of rules and guidelines adopted pursuant to RCW 43.21C.110 shall continue to be effective until the adoptions of any new ordinances or regulations. [Added by Laws 1st Ex Sess 1974 ch 179 § 8, effective May 5, 1974.]

43.21C.180 Model ordinances. The department of ecology, in consultation with concerned state agencies, shall with the assistance of the association of county prosecutors and city attorneys, the association of county elected officials, the Washington state association of counties, and the association of cities, draft model ordinances for use by counties, cities and towns in drafting their ordinances under this chapter. [Added by Laws 1st Ex Sess ch 179 § 10, effective May 5, 1974.]

43.21C.135 Authority of local governmental units to adopt rules, guidelines and model ordinances by reference.

(1) All public and municipal corporations, political subdivisions, and counties of the state are authorized to adopt rules, ordinances, and resolutions which incorporate any of the following by reference to the appropriate sections of the Washington Administrative Code:

(a) Rules and guidelines adopted under RCW 43.21C.110(1) in accordance with the administrative procedure act, chapter 34.04 RCW;

(b) Model ordinances adopted by the department of ecology under RCW 43.21C.130 in accordance with the administrative procedure act, chapter 34.04 RCW.

(2) If any rule, ordinance, or resolution is adopted by reference pursuant to subsection (1) of

this section, any publication of such rule, ordinance, or resolution shall be accompanied by a summary of the contents of the sections of the Washington Administrative Code referred to. Such summaries shall be provided to the adopting units of local government by the department of ecology: Provided, That any proposal for a rule, ordinance or resolution which would adopt by reference rules and guidelines or model ordinances pursuant to this section shall be accompanied by the full text of the material to be adopted which need not be published but shall be maintained on file for public use and examination.

(3) Whenever any rule, ordinance, or resolution is adopted by reference pursuant to subsection (1) of this section, the corporation, political subdivision, or county of the state adopting the rule, ordinance, or resolution shall maintain on file for public use and examination not less than three copies of the sections of the Washington Administrative Code referred to. [Added by Laws 2nd Ex Sess 1975-76 ch 99 § 1.]

CHAPTER 58.17
PLATS--SUBDIVISIONS--DEDICATIONS

58.17.010 Purpose. The purpose of this chapter is to regulate the subdivision of land and to promote the public health, safety and general welfare in accordance with standards established by the state to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas; sites for schools and schoolgrounds and other public requirements; to provide for proper ingress and egress; and to require uniform monumenting of land subdivisions and conveyancing by accurate legal description. [Enacted Laws 1st Ex Sess 1969 ch 271 § 1.]

58.17.020 Definitions. As used in this chapter, unless the context or subject matter clearly requires otherwise, the following words or phrases shall have the following meanings:

(1) "Subdivision" is the division of land into five or more lots, tracts, parcels, sites or divisions for the purpose of sale or lease and shall include all resubdivision of land.

(2) "Plat" is a map or representation of a subdivision, showing thereon the divison of a tract or parcel of land into lots, blocks, streets, and alleys or other divisions and dedications.

(3) "Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.

(4) "Preliminary plat" is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and restrictive covenants to be applicable to the subdivision, and other elements of a plat or subdivision which shall furnish a basis for the approval or disapproval of the general layout of a subdivision.

(5) "Final plat" is the final drawing of the subdivision and dedication prepared for filing for record with the county auditor and containing all elements and requirements set forth in this chapter and in local regulations adopted pursuant to this chapter.

58.17.070 Preliminary plat of subdivisions and dedications-Submission for approval. A preliminary plat of proposed subdivisions and dedications of land shall be submitted for approval to the legislative body of the city, town, or county within which the plat is situated. [Enacted Laws 1st Ex Sess 1969 ch 271 § 7.]

58.17.100 Review of proposed subdivisions by planning commission or agency-Recommendation-Change by legislative body-Procedure-Approval. If a city, town, or county has established a planning commission or planning agency in accordance with state law or local charter, such commission or agency shall review all proposed subdivisions and make recommendations thereon to the city, town or county legislative body to assure conformance of the proposed subdivision to the general purposes of the comprehensive plan and to planning standards and specifications as adopted by the city, town or county. Reports of the planning commission or agency whall be advisory only: Provided, That the legislative body of the city, town or county may, by ordinace, assign to such commission or agency, or any department official or group of officials, such administrative functions, powers and duties as may be appropriate, including the holding of hearings, and recommendations for approval or disapproval of preliminary plats of proposed subdivisions.

Such recommendation shall be submitted to the legislative body not later than fourteen days following action by the hearing body. Upon receipt of the recommendation on any preliminary plat the legislative body shall at its next public meeting set the date for the public meeting where it may adopt or reject the recommendations of such hearing body. If, after considering the matter at a public meeting, the legislative body deems a change in the planning commission's or planning agency's recommendation approving or disapproving any preliminary

plat is necessary, the change of the recommendation shall not be made until the legislative body shall conduct a public hearing and thereupon adopt its own recommendations and approve or disapprove the preliminary plat. Such public hearing may be held before a committee constituting a majority of the legislative body. If the hearing is before a committee, the committee shall report its recommendations on the matter to the legislative body for final action.

A record af all public meetings and public hearings shall be kept by the appropriate city, town or county authority and shall be open to public inspection.

Sole authority to approve final plats, and to adopt or amend platting ordinances shall reside in the legislative bodies. [Enacted Laws 1st Ex Sess 1969 ch 271 § 10.]

58.17.110 Approval or disapproval of subdivision and dedication-Factors to be considered-Finding-Release from damages. The city, town or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine if appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and schoolgrounds, and shall consider all other relevant facts and determine whether the public interest will be served by the subdivision and dedication. If it finds that the proposed plat makes appropriate provisions for the public health, safety, and general welfare and for such open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and school grounds and that the public use and interest will be served by the platting of such subdivision, then it shall be approved.

If it finds that the proposed plat does not make such appropriate provisions or that the public use and interest will not be served, then the legislative body may disapprove the proposed plat. Dedication of land to any public body, may be required as a condition of subdivision approval and shall be clearly shown on the final plat. The legislative body shall not as a condition to the approval of any plat require a release from damages to be procured from other property owners. [Enacted Laws 1st Ex Sess 1969 ch 271 § 11; Amended by Laws 1st Ex Sess 1974 ch 134 § 5, effective July 1, 1974.]

58.17.140 Time limitation for approval or disapproval of plats-Extensions. Preliminary plats of any proposed subdivision and dedication shall be approved, disapproved, or returned to the applicant for modification or correction within ninty days from date of filing thereof unless the applicant consents to an extension of such time period; Provided, That if an environmental impact statement is required as provided in RCW 43.21C.030, the ninety day period shall not include the time spent preparing and circulating the environmental impact statement by the local government agency. Final plats and short plats shall be approved, disapproved, or returned to the applicant within thirty days from the date of filing thereof, unless the applicant consents to an extension of such time period. Ordinances may provide for the expiration of approval given to any preliminary plats. [Enacted Laws 1st Ex Sess 1969 ch 271 § 14; Amended by Laws 1st Ex Sess 1974 ch 134 § 8, effective July 1, 1974.]

58.17.160 Requirements for each plat or replat filed for record. Each and every plat, or replat, of any property filed for record shall:

(1) Contain a statement of approval from the city, town or county licensed road engineer or by a licensed engineer acting on behalf of the

city, town or county as to the survey data, the layout of streets, alleys and other rights of way, design of bridges, sewage and water systems, and other structures;

(2) Be accompanied by a complete survey of the section or sections in which the plat or replat is relocated, or as much thereof as may be necessary to properly orient the plat within such section or sections. The plat and section survey shall be submitted with complete field and computation notes showing the original or reestablished corners with descriptions of the same and the actual traverse showing error of closure and method of balancing. A sketch showing all distances, angles and calculations required to determine corners and distances of the plat shall accompany this data. The allowable error of closure shall not exceed one foot in five thousand feet.

(3) Be acknowledged by the person filing the plat before the auditor of the county in which the land is located, or any other officer who is authorized by law to take acknowledgment of deeds, and a certificate of said acknowledgment shall be enclosed or annexed to such plat and recorded therewith.

(4) Contain a certification from the proper officer or officers in charge of tax collections that all taxes and delinquent assessments for which the property may be liable as of the date of certification have been duly paid, satisfied or discharged.

No engineer who is connected in any way with the subdividing and platting of the land for which subdivision approval is sought, shall examine and approve such plats on behalf of any city, town or county. [Enacted Laws 1st Ex Sess 1969 ch 271 § 16.]

58.17.200 Injunctive action to restrain subdivision, sale, transfer of land where final plat not filed. Whenever any parcel of land

is divided into five or more lots, tracts, or parcels of land and any person, firm or corporation or any agent of any of them sells or transfers, or offers or advertises for sale or transfer, any such lot, tract, or parcel without having a final plat of such subdivision filed for record, the prosecuting attorney shall commence an action to restrain and enjoin further subdivisions or sales, or transfers, or offers of sale or transfer and compel compliance with all provisions of this chapter. The costs of such action shall be taxed against the person, firm, corporation or agent selling or transferring the property. [Enacted Laws 1st Ex Sess 1969 ch 271 § 20.]

58.17.300 Violations-Penalties. Any person, firm, corporation or association or any agent of any person, firm, corporation, or association who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract or parcel of land, shall be guilty of a misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense. [Enacted Laws 1st Ex Sess 1969 ch 271 § 32.]

CHAPTER 90.58
SHORELINE MANAGEMENT ACT OF 1971

90.58.020 Legislative findings-State policy enunciated-Use preference. The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating

increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the state-wide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shoreline;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant

damage to the ecology and environment of the shoreline area and any interference with the public's use of the water. [Added by Laws 1st Ex Sess 1971 ch 286 § 2, effective June 1, 1971.]

90.58.030 Definitions and concepts. As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply:

(1) Administration:

(c) "Local government" means any county, incorporated city, or town which contains within its boundaries any lands or waters subject to this chapter;

(d) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of the state or local governmental unit however designated;

(e) "Hearing board" means the shoreline hearings board established by this chapter.

(2) Geographical:

(c) "Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;

. . . .

chapter at any state of water level;

(e) "Substantial development" shall mean any development of which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with

the normal public use of the water or shorelines of the state: except that the following shall not be considered substantial developments for the purpose of this chapter:

. . . .

90.58.050 Program as cooperative between local government and state-Responsibilites differentiated. This chapter establishes a cooperative program of shoreline management between local government and the state. Local government shall have the primary responsibility for initiating and administering the regulatory program of this chapter. [Added by Laws 1st Ex Sess 1971 ch 286 § 5, effective June 1, 1971.]

90.58.070 Local governments to submit letters of intent--Department to act upon failure of local government.

(1) Local governments are directed with regard to shorelines of the state in their various jurisdictions to submit to the director of the department, within six months from June 1, 1971, letters stating that they propose to complete an inventory and develop master programs for these shorelines as provided for in RCW 90.58.080.

(2) If any local government fails to submit a letter as provided in subsection (1) of this section, or fails to adopt a master program for the shorelines of the state within its jurisdiction in accordance with the time schedule provided in this chapter, the department shall carry out the requirements of RCW 90.58.080 and adopt a master program for the shorelines of the state within the jurisdiction of the local government. [Added by Laws 1st Ex Sess 1971 ch 286 § 7, effective June 1, 1971.]

90.58.080 Timetable for local governments to complete shoreline inventories and master programs. Local governments

(f) "Wetlands" or "wetland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiquous floodplain areas landward two hundred feet from such floodways; and all marshes, bogs, swamps, and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology; Provided, That any county or city may determine that portion of a one-hundred-year flood plain to be included in its master program so long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom;

. . . .

(3) Procedural terms:

(a) "Guidelines" means those standards adopted to implement the policy of this chapter for regulation of use of the shorelines of the state prior to adoption of master programs. Such standards shall also provide criteria to local governments and the department in developing master programs;

(b) "Master program" shall mean the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in RCW 90.58.020;

(c) "State master program" is the cumulative total of all master programs approved by the department of ecology;

(d) "Development" means a use consisting of the construction or exterior alteration of structures; dredging, drilling, dumping, filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary

nature which interferes with the normal public use of the surface of the waters overlying lands subject to this are directed with regard to shorelines of the state within their various jurisdictions as follows:

(1) To complete within eighteen months after June 1, 1971, a comprehensive inventory of such shorelines. Such inventory shall include but not be limited to the general ownership patterns of the lands located therein in terms of public and private ownership, a survey of the general natural characterisitcs thereof, present uses conducted therein and initial projected uses thereof;

(2) To develop, within twenty-four months after the adoption of guidelines as provided in RCW 90.58.060, a master program for regulation of uses of the shorelines of the state consistent with the guidelines adopted. [Added by Laws 1st Ex Sess 1971 ch 286 § 8, effective June 1, 1971; Amended by Laws 1st Ex Sess 1974 ch 61 § 1, effective February 14, 1974.]

90.58.100 Programs as constituting use regulations-Duties when preparing programs and amendments thereto-Program contents.

(1) The master programs provided for in this chapter, when adopted and approved by the department, as appropriate, shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts:

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys,

inventories and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze and manage the information gathered.

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;

(b) A public access element making provision for public access to publicly owned areas.

(c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element;

(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;

(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites and areas having historic, cultural, scientific, or educational values; and

(h) Any other element deemed appropriate or necessary to effectuate the policy of this chapter.

(3) The master programs shall include such map or maps, descriptive text, diagrams and charts, or other descriptive material as are necessary to provide for ease of understanding.

(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same.

(5) Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3). [Added by Laws 1st Ex Sess 1971 ch 286 § 10, effective June 1, 1971.]

90.58.140 Development permits-Grounds for granting-Administration by local government, conditions-

Applications-Notices-Recission-When permits not required-Approval when permit for aviance or conditional use.

(1) No development shall be undertaken on the shorelines of the state except those which are consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, regulations or master program.

(2) No substantial development shall be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

A permit shall be granted:

(a) From June 1, 1971, until such time as an applicable master program has become effective, only when the development proposed is consistent with: (i) The policy of RCW 90.58.020; and (ii) after their adoption, the guidelines and regulations of the department; and (iii) so far as can be ascertained, the master program being developed for the area;

(b) After adoption or approval, as appropriate, by the department of an applicable master program, only when the development proposed is consistent with the applicable master program and the provisions of chapter 90.58 RCW.

(3) Local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section. The administration of the system so established shall be performed exclusively by local government.

(4) Local government shall require notification of the public of all applications for permits governed by any permit system, established pursuant to subsection (3) of this section by ensuring that:

(a) A notice of such an application is published at least once a week on the same day of

the week for two consecutive weeks in a legal newspaper of general circulation within the area in which the development is proposed; and

(b) Additional notice of such an application is given by at least one of the following methods:

(i) Mailing of the notice to the latest recorded real property owners as shown by the records of the county assessor within at least three feet of the boundary of the property upon which the substantial development is proposed;

(ii) Posting of the notice in a conspicuous manner on the property upon which the project is to be constructed; or

(iii) Any other manner deemed appropriate by local authorities to accomplish the objectives of reasonable notice to adjacent landowners and the public.

Such notices shall include a statement that any person desiring to submit written comments concerning an application, or desiring to receive a copy of the final order concerning an application as expeditiously as possible after the issuance of the order, may submit such comments or such requests for orders to the local government within thirty days of the last date the notice is to be published pursuant to subsection (a) of this subsection. Local government shall forward, in a timely manner following the issuance of an order, a copy of the order to each person who submits a request for such order.

If a hearing is to be held on an application, notices of such a hearing shall include a statement that any person may submit oral or written comments on an application at such hearing.

(5) Such system shall include provisions to assure that construction pursuant to a permit will not begin or be authorized until thirty days from the date the final order was filed as provided in subsection (6) of this section; or until all

review proceedings are terminated if such proceedings were initiated within thirty days from the date of filing as defined in subsection (6) of this section except as follows:

(a) In the case of any permit issued to the state of Washington, department of highways, for the construction and modification of the SR 90 (I-90) bridges across Lake Washington, such construction may begin after thirty days from the date of filing;

(b) If a permit is granted by the local government and (i) the granting of the permit is appealed to the shorelines hearings board within thirty days of the date of filing, (ii) the hearings board approves the granting of the permit by the local government or approves a portion of the substantial development for which the local government issued the permit, and (iii) an appeal for judicial review of the hearings board decision is filed pursuant to the provisions of chapter 34.04 RCW, the permittee may request, within ten days of the filing of the appeal with the court, a hearing before the court to determine whether construction may begin pursuant to the permit approved by the hearings board, or to a revised permit issued pursuant to the order of the hearings board. If, at the conclusion of the hearing, the court finds that construction pursuant to such a permit would not involve a significant, irreversible damaging of the environment, the court may allow the permittee to begin such construction pursuant to the approved or revised permit as the court deems appropriate. The court may require the permittee to post bonds, in the name of the local government that issued the permit, sufficient to remove the substantial development or to restore the environment if the permit is ultimately disapproved by the courts, or to alter the substantial development if such alteration is ultimately ordered by the courts: Provided, That construction pursuant to a permit revised at the direction of

the hearings board may begin only on that portion of the substantial development for which the local government had originally issued the permit and construction pursuant to such a revised permit on other portions of the substantial development may not begin until after all review proceedings are terminated. In such a hearing before the court, the burden of proving whether such construction may involve significant irreversible damage to the environment and demonstrating whether such construction would or would not be appropriate shall be on the appellant;

(c) If a permit is granted by the local government and the granting of the permit is appealed directly to the superior court for judicial review pursuant to the proviso in RCW 90.58.180(1) as now or hereafter amended, the permittee may request the court to remand the appeal to the shorelines hearings board, in which case the appeal shall be so remanded and construction pursuant to such a permit shall be governed by the provisions of subsection (b) of this subsection or may otherwise begin after review proceedings before the hearings board are terminated if judicial review is not thereafter requested pursuant to the provisions of chapter 34.04 RCW;

If a permittee begins construction pursuant to subsections (a), (b), or (c) of this subsection, such construction shall begin at the permittee's own risk. If, as a result of judicial review, the courts order the removal of any portion of the construction or the restoration of any portion of the environment involved or required the alteration of any portion of a substantial development constructed pursuant to a permit, the permittee shall be barred from recovering damages or costs involved in adhering to such requirements from the local government that granted the permit, the hearings board, or any appellant or intervener.

(6) Any ruling on an application for a permit under authority of this section, whether it be an approval or a denial, shall, concurrently with the transmittal of the ruling to the applicant, be filed with the department of the attorney general. With regard to a permit other than a permit governed by subsection (12) of this section, "date of filing," as used herein shall mean the date of actual receipt by the department. With regard to a permit for a variance or a conditional use, "date of filing," shall mean the date a decision of the department rendered on the permit pursuant to subsection (12) of this section is transmitted by the department to the local government. The department shall notify in writing the local government and the applicant of the date of filing.

(7) Applicants for permits under this secion shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.180(1) and (2) as now or hereafter amended, the person requesting the review shall have the burden of proof.

(8) Any permit may, after a hearing with adequate notice to the permittee and the public, be rescinded by the issuing authority upon the finding that a permittee has not complied with conditions of a permit. In the event the department is of the opinion that such noncompliance exists, the department shall provide written notice to the local government and the permittee. If the department is of the opinion that such noncompliance continues to exist thirty days after the date of the notice, and the local government has taken no action to rescind the permit, the department may petition the hearings board for a rescission of such permit upon written notice of such petition to the local government and the permittee: Provided, That the

request by the department is made to the hearings board within fifteen days of the termination of the thirty day notice to the local government.

(9) The holder of a certification from the governor pursuant to chapter 80.50 RCW shall not be required to obtain a permit under this section.

(10) No permit shall be required for any development on shorelines of the state included within a preliminary or final plat approved by the applicable state agency or local government prior to April 1, 1971, if:

(a) The final plat was approved after April 13, 1961, or the preliminary plat was approved after April 30, 1969; and

(b) The development is completed within two years after the effective date of this chapter.

(11) The applicable state agency or local government is authorized to approve a final plat with respect to shorelines of the state included within a preliminary plat approved after April 30, 1969, and prior to April 1, 1971: Provided, That any substantial development within the platted shorelines of the state is authorized by a permit granted pursuant to this section, or does not require a permit as provided in subsection (10) of this section, or does not require a permit because of substantial development occurred prior to June 1, 1971.

(12) Any permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval. [Added by Laws 1st Ex Sess 1971 ch 286 § 14, effective June 1, 1971: Amended by Laws 2nd Ex Sess 1973 ch 19 § 1, effective September 22, 1973; Laws 1st Ex Sess 1975 ch 182 § 3; Laws 2nd Ex Sess 1975-76 ch 51 § 1; Laws 1st Ex Sess 1977 ch 358 § 1.]

90.58.170 Shorelines hearings board-Established-Members-Chairman-Quorum for decision-Administrative and clerical assistance-Expenses of members. A shorelines hearings board sitting as a quasi judicial body is hereby established which shall be made up of six members: Three members shall be members of the pollution control hearings board; two members, one appointed by the association of Washington cities and one appointed by the association of county commissioners, both to serve at the pleasure of the associations; and the state land commissioner or his designee. The chairman of the pollution control hearings board shall be the chairman of the shorelines hearings board. A decision must be agreed to by at least four members of the board to be final. The pollution control hearings board shall provide the shorelines appeals board such administrative and clerical assistance as the latter may require. The members of the shoreline appeals board shall receive the compensation, travel, and subsistence expenses as provided in RCW 43.03 050 and RCW 43.03.060. [Added by Laws 1st Ex Sess 1971 ch 286 § 17, effective June 1, 1971.]

90.58.175 Rules and regulations. The shorelines hearings board may adopt rules and regulations governing the administrative practice and procedure in and before the board. [Added by Laws 1st Ex Sess 1973 ch 202 § 3.]

90.58.180 Appeals from granting, denying or rescinding permits, procedure-Board to act, when-Local government appeals to board-Grounds for declaring master program invalid-Appeals to court, procedure.

(1) Any person aggrieved by the granting, denying or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 as now or hereafter amended may seek review from the shorelines hearings board by filing a request for the

same withing thirty days of the date of filing as defined in RCW 90.58.140(6) as now or hereafter amended.

Concurrently with the filing of any request for review with the board as provided in this section pertaining to a final order of a local government, the requestor shall file a copy of his request with the department and the attorney general. If it appears to the department or the attorney general that the requestor has valid reasons to seek review, either the department or the attorney general may certify the request within thirty days after its receipt to the shorelines hearings board following which the board shall then, but not otherwise, review the matter covered by the requestor; PROVIDED, That the failure to obtain such certification shall not preclude the requestor from obtaining a review in the superior court under any right to review otherwise available to the requestor. The department and the attorney general may intervene to protect the public interest and insure that the provisions of this chapter are complied with at any time within fifteen days from the date of the receipt by the department or the attorney general of a copy of the request for review filed pursuant to this section. The shorelines hearings board shll initially schedule review proceedings on such requests for review without regard as to whether such requests have or have not been certified or as to whether the period for the department or the attorney general to intervene has or has not expired, unless such review is to begin within thirty days of such scheduling. If at the end of the thirty day period for certification neither the department nor the attorney general has certified a request for review, the hearings board shall remove the request from its review schedule.

(2) The department or the attorney general may obtain review of any final order granting a permit, or granting or denying an application for a permit issued by a local government by filing a

written request with the shorelines hearings board and the appropriate local government within thirty days from the date and the final order was filed as provided in RCW 90.58.140(6) as now or hereafter amended.

(3) The review proceedings authorized in subsections (1) and (2) of this section are subject to the provisins of chapter 34.04 RCW pertaining to procedures in contested cases. Judicial review of such proceedings fo the shorelines hearings board may be had as provided in Chapter 34.04 RCW.

(4) Local government may appeal to the shorelines hearings board any rules, regulations, guidelines, designations, or master programs for shorelines of the state adopted or approved by the department within thirty days of the date of the adoption or approval. The board shall make a final decision within sixty days following the hearing held thereon.

(a) In an appeal relating to a master program for shorelines, the board, after full consideration of the positions of the local government and the department, shall determine the validity of the master program. If the board determines that said program:

(i) Is clearly erroneous in the light of the policy of this chapter; or

(ii) Constitutes an implementation of this chapter in violation of constitutional or statutory provisions; or

(iii) Is arbitrary and capricious; or

(iv) Was developed without fully considering and evaluating all proposed master programs submitted to the department by the local government; or

(v) Was adopted in accordance with required procedures; the board shall enter a final decsion declaring the program invalid, remanding the master program to the department with a statement of the reasons in support of the determination, and directing the department to adopt, after

a thorough consultation with the affected local government, a new master program. Unless the board makes one or more of the determinations as hereinbefore provided, the board shall find the master program to be valid and enter a final decision to that effect.

(b) In an appeal relating to a master program for shorelines of state-wide significance the board shall approve the master program adopted by the department unless a local government shall, by clear and convincing evidence and argument, persuade the board that the master program approved by the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

(c) In an appeal relating to rules, regulations, guidelines, master programs of state-wide significance, and designations, the standard of review provided in RCW 34.04.070 shall apply.

(5) Rules, regulations, designations, master programs, and guidelines shall be subject to review in superior court, if authorized pursuant to RCW 34.04.070: PROVIDED, That no review shall be granted by a superior court on petition from a local government unless the local government shall first have obtained review under subsection (4) of this section and the petition for court review is filed within three months after the date of final decision by the shorelines hearings board. [Enacted Laws 1st Ex Sess 1971 ch 286 § 18, effective June 1, 1971; Amended by Laws 1st Ex Sess 1973 ch 203 § 2: Laws 1st Ex Sess 1975 ch 182 § 4: Laws 2nd Ex Sess 1975-1976 ch 51 § 2.]

90.58.190 Review and adjustments to master programs. The department and each local government shall periodically review any master programs under its jurisdiction and make such adjustments thereto as are necessary. Each local government shall submit any proposed adjustments, to the department as soon as they are completed. No such adjustment shall become effective until it has been approved by the department. [Added by Laws 1st Ex Sess 1971 § 390.]

90.58.220 General penalty. In addition to incurring civil liability under RCW 90.58.210, any person found to have wilfully engaged in activities on the shorelines of the state in violation of the provisions of this chapter or any of the master programs, rules, or regulations adopted pursuant therto shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment: Provided, That the fine for a third and all subsequent violations in any five-year period shall be not less than five hundred nor more than ten thousand dollars. [Added by Laws 1st Ex Sess 1971 ch 286 § 22, effective June 1, 1971.]

90.58.230 Violators liable for damages resulting from violation-Attorney's fees and costs. Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons

similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party. [Added by Laws 1st Ex Sess 1971 ch 286 § 23, effective June 1, 1971.]

90.58.280 Application to all state agencies, counties, public and municipal corporations. The provisions of this chapter shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them. [Added by Laws 1st Ex Sess 1971 ch 286 § 28, effective June 1, 1971.]

90.58.340 Use policies for land adjacent to shorelines, development of. All state agencies, counties, and public and municipal corporations shall review administrative and management policies, regulations, plans, and ordinances relative to lands under their respective jurisdictions adjacent to the shorelines of the state so as to achieve a use policy on said land consistent with the policy of this chapter, the guidelines, and the master programs for the shorelines of the state. The department may develop recommendations for land use control for such lands. Local governments shall, in developing use regulations of such areas, take into consideration any recommendations developed by the department as well as any other state agencies or units of local government. [Added by Laws 1st Ex Sess 1971 § 34, effective June 1, 1971.]

APPENDIX C
THURSTON COUNTY REGULATIONS

Title 18
PLATTING AND SUBDIVISIONS

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Chapter 18.04
GENERAL PROVISIONS

18.04.010 Title. The ordinance codified in this title shall be knnown as the "Thurston County platting and subdivisions ordinance". (Ord. 1748 § 1 Ch. 1(1), 1974).

18.04.020 Purpose. The provisions contained in this title are necessary to regulate the subdivision of land; to promote the public health, safety and general welfare in accordance with established standards; to prevent the overcrowding of land, to lessen congestion in the streets and highways; to provide for adequate light and air; to produce the proper arrangement of streets, lots, easements, pathways and other private or public ways to provide for adequate and convenient open spaces, utilities, recreation and access for service and emergency vehicles; to provide for adequate water, drainage, sewer and other public facilities; to encourage the most appropriate use of land; to promote a coordination of development as land develops; to conserve and restore natural beauty and ogher natural resources; to maintain and perpetuate envoronmental quality; and to require uniform monumenting of land subdivisions and conveyance by accurate legal description. (Ord. 4748 § 1 Ch. 1(20, 1974).

18.04.030 General scope. Subdivisons, resubdivisions, short subdivisions and streets created to the purpose of partitioning land shall be presented for review in accordance with the provisions of this title. (Ord. 4748 § 1 Ch. 1(3), 1974).

. . . .

18.04.050 Regulations mandatory. Any map, plat, replat or plan hereafter made of a proposed subdivision or short subdivision or any part thereof shall be presented for approval and be recorded as prescribed by this title. No such map, plat, replat or plan shall be recorded or have any validity unless or until it has the recommendation of the planning commission and the approval of the board of county commissioners and/or such other approval as required by this title. (Ord. 4748 § 1 Ch. 1(5), 1974).

18.04.060 Administration. The Thurston County planning director and his staff, hereafter referred to as the "planner," is vested with the duty of administering this title and may prepare and require the use of such additional forms which are necessary to effectuate the provisions of this title. (Ord. 4748 § 1 Ch. 1(6), 1974).

Chapter 18.08
DEFINITIONS

. . . .

18.08.090 Comprehensive plan. "Comprehensive plan" means a plan adopted by the board of county commissioners as a guide to the growth and improvement of Thurston County, including modifications or refinements which may be made from time to time. (Ord. 4748 § 1 Ch. 2(8), 1974).

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18.12.010 Presubmission conference. Prior to the submission of the preliminary plat, the subdivider or his representative shall meet with the planner and the public works department to discuss preliminary studies or sketches. At this time said departments shall make available all pertinent information as may be on file relating to the general area. It is the purpose of this conference to eliminate as many potential problems as possible in order for the preliminary plat to be processed without delay. The conference should take place

prior to detailed work by an engineer or surveyor. Discussion topics at this time would include such things as the comprehensive plan, street plan, shoreline master plan, zoning, availability of sewer and water, development concepts, other county requirements and permits, and the environmental impact of the plat. If the applicant owns adjacent land, the possibilities of future development shall be discussed. (Ord. 4748 § 1 Ch. 3(1), 1974).

18.12.020 Submission. Subsequent to the presubmission conference, the subdivider shall prepare a preliminary plat and environmental assessment together with improvement plans and other supplemental material required to indicate his general program and objectives, and shall submit a minimum of seventeen copies of the preliminary plat and supplementary data to the office of the planner at least twenty-one days prior to the planning commission meeting at which consideration of the plat is desired. The preliminary plat need not be a finished drawing but it would show all pertinent information to scale in order that the planning commission may properly review the proposed development. The planner, on behalf of the planning commission, shall assign the subdivision a permanent file number. The planner shall inform the applicant immediately of any deficiencies found in the preliminary plat. (Ord. 4748 § 1 Ch. 3(2), 1974).

18.12.030 Environmental assessment and impact statements Each and every preliminary plat submitted to the planner shall be accompanied by an environmental assessment statement. If it is determined that an environmental impact statement is required to be completed, then the plat shall not be considered as submitted until the final environmental impact statement has been completed. No public hearing on the preliminary plat shall be held until the final environmental impact statement (if required) has been completed and been made

available for the general public. (Ord. 4748 § 1 Ch. 3(3) 1974).

18.12.040 Distribution. The planner shall distribute copies of the preliminary plat and pertinent information to the following:

(1) Public works department, two copies:
(2) Thurston-Mason health district, one copy:
(3) Appropriate fire protection district, one copy:
(4) Parks and recreation department, one copy:
(5) Appropriate school district, one copy:
(6) Appropriate telephone company, one copy:
(7) Puget Power, one copy:
(8) Washington Natural Gas Company, one copy:
(9) Thurston County assessor, one copy:
(10) Appropriate city engineer, when such plats are located within one mile of a city boundary, one copy:
(11) Department of Highways, when such plats are located within three hundred feet of a state highway right-of-way, one copy:
(12) Other public officials and agencies as the planner may deem necessary. (Ord. 4748 § 1 Ch. 3(4), 1974).

18.12.050 Public hearing -- Planning commission. Upon receipt of a preliminary plat and all required data, the planner shall set a date for public hearing before the planning commission. Notice of the date, time and place of the public hearing before the planning commission shall be given as follows:

(1) Notice of the hearing shall be mailed by the planner not less than ten days prior to the date of hearing to the adjacent landowners as follows: Notice shall be given to all of the

owners of land adjacent to the exterior boundary of the proposed plat. If the applicant owns adjoining land, the distance of notification shall be measured from the out-side of his ownership. Names and addresses for such property owners shall be as shown on the latest records of the county assessor, and shall be supplied to the planner by the applicant. Failure of any person to receive the notice shall not invalidate the hearing;

(2) Notice of such hearing shall be given by publication at least once, not less than ten days prior to the date of hearing, in a newspaper of general circulation within the county;

(3) Notice to any town, city or county whose boundaries are adjacent to or within one mile of the proposed subdivision;

(4) Notice to the State Department of Highways on every proposed subdivision located within three hundred feet of the right-of-way of a state highway;

(5) Notice to the State Department of Ecology, Division of Water Resources, if the land is situated in a floodplain or flood control zone as provided in RCW Chapter 86.10, and to any other federal, state or local agency as may be relevant to determine if the public use and interest may be served by the proposed subdivision;

(6) Notice to any city or town whose utilities are contemplated to be used by the proposed subdivision;

(7) Posting of the notice on or near the property in at least three conspicuous places. The notice must be viewable from a public right-of-way.

All hearing notices shall include a legal description of the location of the proposed subdivision and either a vicinity location sketch or a locational description in nonlegal language. (Ord. 4748 § 1 Ch. 3(5), 1974).

18.12.060 Planning commission review. At the public hearing the planning commission shall consider all relevant evidence to determine whether

to recommend that the preliminary plat be approved or disapproved by the board of county commissioners. Any hearing may be continued at the discretion of the planning commission within the time limits allowed by law. The planning commission's obligation to review the preliminary plat shall be as follows:

(1) To assure conformance of the proposed subdivision to the general purposes of this title, the comprehensive plan, and to the planning standards, specifications and policies of Thurston County;

(2) To inquire into the public use and interest proposed to be served by the establishment of the subdivision and/or dedication, it shall determine if appropriate provisions are made for, but not limited to, the following:

(a) Prevention of Overcrowding. Consideration should be given to the physical characteristics of the land in relation to the number of persons, building or sites proposed to be located thereon, and also to the availability of public facilities such as water, sewers, fire protection, streets, schools, parks, etc., if not adequately provided for within the subdivision.

(b) Adequate Traffic Circulation on the Streets and Highways. Proposed streets must be aligned or built in such a way as to best facilitate the movement of traffic and reduce the possibility of accidents. Consideration may be given to alignment of intersections, width and surfacing of streets, proper curbs, sidewalks or paths, radii of curves, and sight vision at intersections, hills and private easements.

(c) Adequate Light and Air. The plat should be arranged in such a way that all lots have adequate light and air.

(d) Proper Arrangement and Provision of Easements and Pathways and other Bicycle-Pedestrian Paths, etc. Easements and pathways should conform with existing layout of ways and streets and

also to adopted plans for such. Adequate provisions for pathways connecting various parts of a subdivision should be considered in such a way that most of the pedestrian and nonmotorized vehicular traffic is diverted away from streets. Trail systems in areas conducive to such along creeks, rivers, scenic areas, etc., should be provided.

(e) Adequate Recreation and Open Space or Buffers. There should be sufficient amounts of guaranteed open space and recreational areas to adequately serve the subdivision. If it is determined that there are not adequate open space and recreational areas to adequately serve the subdivision, then it will be recommended that additional areas as determined by the planning commission to be provided for these purposes;

(3) To consider the physical characteristics of the proposed subdivision site and may recommend disapproval because of flood, inundation or swamp conditions. The planning commission may recommend that construction of protective improvements be required as a conditon of approval, with such improvements to be noted on the final plat. Written findings of fact on each item considered shall be submitted to the board of county commissioners with the preliminary plat. (Ord. 4748 § 1 Ch. 3(6), 1974).

18.12.070 Hearing --Public record. All hearings shall be public. Records of the planning commission hearings on preliminary plats shall be kept by the planner and shall be made available to the public upon request. (Ord. 4748 § 1 Ch. 3(7), 1974).

18.12.080 Planning commission report to board of county commissioners. Not later than fourteen days following planning commission action, the planning commission shall submmit its written report and findings of fact and recommendations to the board of county commissioners. The planning commission may recommend that the proposed plat be approved, conditionally approved or disapproved.

In the event that a decision cannot be reached by the planning commission, the preliminary plat shall be forwarded to the board of county commissioners with no recommendation. (Ord. 4748 § 1 Ch. 3(8), 1974).

18.12.090 Procedure--Board of county commissioners. Upon receipt of the recommendations on any preliminary plat, the board of county commissioners shall at its next public meeting set the date for the public meeting where it may adopt or reject the planning commission's recommendations. If, after considering the matter at a public meeting, the board of county commissioners deems a change in the planning commission's recommendation approving or disapproving any preliminary plat is necessary, the change in recommendation shall not be made until the board of county commissioners conducts a public hearing and therupon adopts it own recommendations and approves or disapproves the preliminary plat.

The board of county commissioners shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. The board shall determine if appropriate provisions are made for, but not limited to, the public health, safety and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgounds, sites for schools and school grounds, and shall consider all other relevant facts and determine whether the public interest will be served by the subdivision and dedication. If the board finds that the proposed plat makes appropriate provisions for the public health, safety and general welfare and for such open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and school grounds and that the public use and interest will be served by the platting of such subdivision, then it shall be approved. If the board finds that the

proposed plat does not make such appropriate provisions or that the public use and interest will not be served, then the board may disapprove the proposed plat. In making a decision on the preliminary plat the board of county commissioners shall also consider items (1) through (3) in Section 18.12.060. Dedication of land to any public body may be required as a condition of subdivision approval and shall be clearly shown on the final plat. (Ord. 4748 § 1 Ch. 3(9), 1974).

. . . .

18.12.120 Time limit on action. Preliminary plats of any proposed subdivision and dedication shall be approved, disapproved or returned to the applicant for modification or correction within ninety days from date of filing thereof unless the applicant consents to an extension of such time period; provided, that if an environmental impact statement is required as provided in RCW 43.21C.-030, the ninety-day period shall not include the time spent preparing and circulating the environmental impact statement. (Ord. 4748 § 1 Ch. 3(12), 1974).

APPENDIX C
ORDINANCE 5172

. . . .

ENVIRONMENTAL POLICY REGULATIONS

A. Policies and Authority

1. Thurston County hereby adopts by reference the policies of the State Environmental Policy Act as expressed in RCW 43.21C.010 and RCW 43.21C.020.

2. The County and its departments have and should exercise where appropriate the authority to deny or condition all public and provate proposals, subject to the limitations of this section, so as to mitigate or prevent identified adverse environmental impacts. A proposal, which is a major action only, may be denied if: (1) the proposal would result in significant and unavoidable adverse environmental impacts indentified in an environmental document prepared pursuant to this ordinance: and (2) approval of such a proposal would be arbitrary and capricious or clearly erroneous in view of such impacts. A proposal which is a major action only may be conditioned: (1) so as to mitigate or prevent any adverse environmental impacts identified in an environmental document prepared pursuant to this ordinance; and (2) where the conditions can reasonably be fulfilled.

B. Adoption by Reference (Refer to attached sections of WAC 197-10

Thurston County hereby adopts by reference the following sections or subsections of Chapter 197-10) of the Washington Administrative Code:

. . . .

G. Lead Agency Determination and Responsibility

1. Any department within the County receiving or initiating a proposal any portion of which involves a major action, shall determine the lead agency for that proposal pursuant to the criteria set forth in Section WAC 197-10-204 through -270, using the procedures of WAC 197-10-203. This determination shall be made for each proposal involving a major action unless the lead agency has been previously determined, or the department is aware that another department or agency is in the process of determining the lead agency. A lead agency must be an agency with jurisdiction.
2. In those instances in which the County is the lead agency, the responsible official of the County shall supervise compliance with the threshold determination, and if an EIS is necessary, shall supervise preparation of the draft and final EIS.
3. In those instances in which the County is not the lead agency under the criteria of WAC 197-10-205 through -207, all departments of the County subject to the limitations of WAC 197-10-660, and-609 shall utilize and consider as appropriate either the declaration of nonsignificance or the final EIS of the lead agency in conjunction with the decisions of the County on the proposal. In such instances, no County department shall prepare or require preparation of a declaration of nonsignificance or EIS in addition to that prepared by the lead agency.

. . . .

5. Departments of the County are authorized to make agreements as to lead agency status pursuant to WAC 197-10-240 and WAC 197-10-245: Provided, that any such agreement involving assumption of lead agency status by the County will first be approved by the responsible official for the County and that any department which will incur responsiblities as a result of any such agreement.
6. Any department making a lead agency determination for a private project shall require sufficient information from the applicant to ascertain which other agencies have jurisdiction over the proposal.

H. Environmental Checklist

1. Except as provided in WAC 197-10-300(2), a completed environmental checklist, or a copy thereof, substantially in the form provided in WAC 197-10-365 shall be filed at the same time as an application for a permit, license, certificate, or other entitlement for use not specifically exempted herein. This checklist shall be the basis for a determination by the County as to lead agency status and if the County is determined to be the lead agency, then for the threshold determination.
2. For all proposals for which the County is the lead agency, the responsible official of the County shall make the threshold determination pursuant to the criteria and procedures of WAC 197-10-300 through -365.

I. Preparation of EIS

1. The draft EIS on an action for which application is made by a private applicant, shall be prepared by the responsible official or his designee. All final EIS's shall be prepared by the responsible official.

2. When the private applicant prepares the draft EIS, the responsible official shall assure that the EIS is prepared in a responsible manner and with appropriate methodology. The responsible official shall direct the areas of research and examination to be undertaken, as well as the organization of the resulting document. The draft and final EIS's must be approved by the responsible official prior to distribution.
3. Within 21 days of the date that the applicant submits or resubmits a draft EIS to the responsible official, the responsible official shall either distribute the approved draft EIS for review or request the applicant to resubmit the draft EIS with additional information or substance. The applicant shall not be required to provide more information than is required by WAC 197-10-425, -440, -442, -444 and (J) in this ordinance.
4. The final EIS shall be distributed within 14 days of the last review of the draft EIS.

J. Designation of Official to Perform Consulted Agency Responsibilities for the County

1. The County Planning Director shall be responsible for the preparation of the written comments for Thurston County in response to a consultation request prior to a threshold determination, participation in predraft consultation, or reviewing a draft EIS.
2. The official designated in paragraph one hereof shall be responsible for compliance by the County with WAC 197-10 -500 through -540 wherever the County is a consulted agency, and is hereby authorized to develop operating procedures which will ensure that responses to consultation

requests are prepared in a timely fashion and include data from all appropriate departments of the County.

K. Designation of Responsible Official

1. For those proposals for which the County is the lead agency, the responsible official shall be the Thurston County Planning Director.
2. The responsible official shall make the threshold determination, supervise preparation of any required EIS, and perform any other functions assigned to the "lead agency" or "responsible official" by those sections of the SEPA guidelines which were adopted by reference in Section A hereof, for all proposals for which the County is the lead agency.

. . . .

EFFECTIVE: July 19, 1976
BOARD OF THURSTON COUNTY COMMISSIONERS

_____

_____

ATTEST:

_____
County Auditor and Ex Officio Clerk
of the Board of County Commissioners

PREPARED AND PRESENTED BY:

PATRICK D. SUTHERLAND
Prosecuting Attorney

By _____
Alexander W. Mackie
Deputy Prosecution Attorney

ADOPTED SECTIONS OF
WAC 197-10 (SEPA GUIDELINES)

WAC 197-10-040 DEFINITIONS. The following words and terms have the following meanings for the purposes of this chapter, unless the context indicates otherwise:

(1) Acting Agency. Acting agency means an activity potentially subject to the environmental impact statement requirements of RCW 43.21C.-030(20(c) and (2)(d). [See the provisions of WAC 197-10-170, -175 and -180 for activities that are exempted from the threshold determination and enviornmental impact statement requirements of SEPA and these guidelines, due to CEP's determination that such activities are minor, not "major," actions even though such activities are within one of the subcategories below.] All actions fall within one of the following subcategories:

(a) Governmental licensing.

(b) Governmental action of a project nature. This includes and is limited to:

(i) the decision by an agency to undertake any activity which will directly modify the physical environment, whether such activity will be undertaken directly by the agency or through contract with another, and

(ii) the decision to purchase, sell, lease, transfer or exchange natural resources, including publicly owned land, whether or not it directly modifies the environment.

(c) Governmental action of a non-project nature. This includes and is limited to:

(i) the adoption or amendment of legislation, ordinances, rules or regulations which contain standards controlling use or modification of the physical environment;

(ii) the adoption or amendment of comprehensive land use plans or zoning ordinances:

(iii) the adoption of any policy, plan or program which will govern the development of a

series of functionally related major actions, but not including any policy, plan or program for which approval must be obtained from any federal agency prior to implementation;

(iv) creation of, or annexations to, any city, town or district;

(v) adoptions or approvals of utility, transportation and solid waste disposal rates;

(vi) capital budgets; and

(vii) road, street and highway plans.

(3) Agencies with Expertise. Agencies with expertise means those agencies to which a draft environmental impact statement shall be sent pursuant to WAC 197-10-465, unless they are also agencies with jurisdiction.

(4) Agencies with Jurisdiction. Agencies with jurisdiction means those agencies from which a non-exempt license is required for a proposal or any part thereof, or which will act upon an application for a grant or loan for a proposal, or agencies which are proposing or initiating any governmental action of a project or non-project nature. The term does not include those agencies authorized to adopt rules or standards of general applicability which govern the proposal in question, when no license or approval is required for specific proposals; nor does the term include agencies, involved in approving grants or loans, which serve only as conduits between the primary administering agency and the recipient of the grant or loan. Federal agencies with jurisdiction are instrumentalities of the fedral government from which a license is required, or which will receive an application for a grant or loan for a proposal.

(5) Agency or Agencies. Agency or agencies mean all state agencies and local agencies as defined in this section. The term does not include any agency or division of the federal government. Whenever a specific agency has been named in these quidelines and the functions of that agency have been transferred to another agency, then the term shall mean such successor agency.

(6) CEP. CEP means the council on environmental policy.

(7) Consulted Agency. Consulted agency means any agency with jurisdiction or with expertise which is consulted, or from which information is requested by a lead agency during the threshold determination, pre-draft consultation, or consultation on a draft environmental impact statement.

(8) County/City. County/city means a county, city or town. For the purposes of this chapter, duties and powers are assigned to a county, city or town as a unit, with the delegation of responsibilities among the various departments of a county, city or town being left to the legislative or charter authority of the individual counties, cities or towns.

(9) Declaration of Non-Significance. Declaration of non-significance means the written decision by the responsible official of the lead agency that a proposal will not have a significant adverse environmental impact and that therefore no environmental impact statement is required. A form substantially consistent with that in WAC 197-10 -355 shall be used for this declaration.

(10) Declaration of Significance. Declaration of significance means the written decison by the responsible official of the lead agency that a proposal will or could have a significant adverse environmental impact and that therefore an environmental impact statement is required. A form substantially consistent with that in WAC 197-10 -355 shall be used for this declaration.

(11) Draft EIS. Draft EIS means an environmental impact statement prepared prior to the final detailed statement.

(12) EIS. EIS means the detailed statement required by RCW 43.21C.030(2)(c). It may refer to either a draft or final environmental impact statement, or both, depending upon context.

(13) Environment. Environment means, and is limited to, those areas listed in WAC 197-10-444.

(14) Environmental Checklist. Environmental checklist means the form contained in WAC 197-10 -365.

(15) Environmental Document. Environmental document means every written public document prepared or utilized as a result of the requirements of this chapter.

(16) Environmentally Sensitive Area. Environmentally sensitive area means an area designated and mapped by a county/city pursuant to WAC 197-10-177 and within which certain categorical exemptions do not apply.

(17) Final EIS. Final EIS means an environmental impact statement prepared to reflect comments to the draft EIS. It may consist of a new document, or of the draft EIS together with supplementary material prepared pursuant to WAC 197-10 -570, -580 or -695.

(18) Lands Covered by Water. Lands covered by water means lands underlying the water areas of the state, including salt waters, tidal waters, estuarine waters, natural water courses, lakes, ponds, artifically impounded waters, marshes and swamps. Certain categorical exemptions do not apply to lands covered by water.

(19) Lead Agency. Lead agency means the agency designated by the provisions of WAC 197-10 -200 through -270 or -345, which is responsible for making the threshold determination and preparing or supervising preparation of the draft and final environmental impact statements.

(20) License. License means any form of written permission given to any person, organization or agency to engage in any activity, as required by law or agency rule. A license thus includes the whole or part of any agency permit, certificate, approval, registration, charter, or plat approvals or rezones to facilitate a particular project: a license required solely for revenue purposes is not included.

(21) Licensing. Licensing means the agency process in granting, renewing or modifying a license.

(22) List of Elements of the Environment. List of elements of the environment means the list contained in WAC 197-10-444 which must be attached to every environmental impact statement.

(23) Local Agency. Local agency means any political subdivision, regional governmental unit, district, municipal or public corporation including cities, towns and counties. The term does not include the departments of a city or county.

(24) Major Action. Major action means any "action" defined in this secion which is not exempted by WAC 197-10-170, -175 and -180.

(25) Non-Project EIS. Non-project EIS means an environmental impact statement prepared for a proposal for any governmental action of a non-project nature as defined under "action" in this section.

(26) Physical Environment. Physical environment means and is limited to those elements of the environment listed under "physical environment" in WAC 197-10-444(2).

(27) Private Applicant. Private applicant means any person or entity, other than an agency as defined in this section, applying for a license from an agency.

(28) Private Project. Private project means any proposal for which the primary initiator or sponsor is an individual or entity other than an "agency" as defined in this section.

(29) Proposal. Proposal means a specific request to undertake any activity submitted to, and which is seriously considered by, an agency or a decison-maker within an agency, as well as any action or activity which may result from approval of any such request. Futher definition of the scope of a proposal for the purposes of lead agency determination, the threshold determination, and impact statement preparation is contained in WAC 197-10-060.

(30) Responsible Official. Responsible official means that officer or officers, committee, department or section of the lead agency designated by the lead agency's guidelines to undertake its responsibilities as lead agency [See WAC 197-10 -820].

(31) SEPA. SEPA means the state environmental policy act of 1971, Chapter 43.21C., RCW, as amended.

(32) State Agency. State agency means any state board, commission or department except those in the legislative or judicial branches. The term includes the office of the governor and the various divisions thereof, state universities, colleges and community colleges.

(33) Threshold Determination. Threshold determination means the decison by a lead agency whether or not an environmental impact statement is required for a proposal.

WAC 197-100-106 SCOPE OF A PROPOSAL AND ITS IMPACTS FOR THE PURPOSES OF LEAD AGENCY DETERMINATION, THRESHOLD DETERMINATION, AND EIS PREPARATION. (1) The proposal considered by an acting agency during the lead agency determination procedure, and by the lead agency during the threshold determination and EIS preparation, shall be the total proposal including its direct and indirect impacts. Whenever the word "proposal" or the term "proposed action" is used in this chapter, the discussion in subsection (2) hereof is applicable. In considering the environmental impacts of a proposal during the threshold determination and EIS preparation, the discussion in subsection (3) hereof is applicable.

(2) The total proposal is the proposed action, together with all proposed activitiy which is functionally related to it. Future activities are functionally related to the present proposal if:

(a) The future activity is an expansion of the present proposal, facilitates operation of the present proposal or is necessary thereto: or

(b) The present proposal facilitates or is a necessary prerequisite to future activities.

The scope of the proposal is not limited by the jurisdiction of the lead agency. The fact that future impacts of a proposal will require future governmental approvals shall not be a bar to their present consideration, so long as the plans for those future elements are sufficiently specific to allow some evaluation of their potential environmental impacts. Acting agencies and lead agencies should be alert to the possibility that a proposal may involve other agencies with jurisdiction which may not be taking any action until sometime in the future. (For example, in a proposal for a plat approval, another agency with jurisdiction may be the appropriate sewer district, even though installation of sewers may not occur until several years later.)

(3) The impacts of a proposal include its direct impacts as well as its reasonably anticipated indirect impacts. Indirect impacts are those which result from any activity which is induced by a proposal. These include, but are not limited to, consideration of impacts resulting from growth induced by the proposal, or the likelihood that the present action will serve as a precedent for future actions. (For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects.) Contemporaneous or sebsequent development of a similar nature, however, need not be considered in the threshold determination unless there will be some causal connection between such development and one or more of the governmental decisions necessary for the proposal in question.

(4) Proposals involving extensive future actions may be divided, at the option of the lead

agency, into segments with an EIS prepared for each segment. In such event, the earlier EIS shall describe the later segments of the proposal and note that future environmental analysis will be required for these future segments. The segmentation allowed by this subsection shall not be applied at the threshold determination to determine that any segment of a more extensive significant proposal is insignificant; nor shall segmentation be applied so as to require significant duplication of analysis contained in an earlier EIS.

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WAC 17-10-200 LEAD AGENCY--RESPONSIBILITIES. The lead agency shall be the only agency responsible for complying with the threshold determination procedures of WAC 197-10-300 through -390; and the lead agency shall be responsible for the supervision, or actual preparation, of draft EISs pursuant to WAC 197-10-400 through -495, including the circulation of such statements, and the conduct of any public hearings required by this chapter. The lead agency shall also prepare or supervise preparation of any required final EIS pursuant to WAC 197-10-550 through -695.

WAC 197-10-203 DETERMINATION OF LEAD AGENCY --PROCEDURES. (1) The first agency receiving or initiating a proposal for a major action, or for any part of a proposal when the total proposal involves a major action, shall determine the lead agency for that proposal. To ensure that the lead agency is determined early, agencies shall determine the lead agency for all proposals for a major action they receive, unless the lead agency has been previously determined or the agency is in the process of determining the lead agency. The lead agency shall be determined by using the criteria in WAC 197-10-205 through -245.

(2) If the acting agency determines that another agency is the lead agency, it shall mail to such lead agency a copy of the application it received, together with its determination of lead

agency and explanation thereof. If the agency receiving this determination agrees that it is the lead agency, it shall so notify the other agencies with jurisdiction. If it does not agree, and the dispute cannot be resolved by agreement, the agencies shall immediately petition CEP for a lead agency determination pursuant to WAC 197-10-260.

(4) Any agency receiving a lead agency determination to which it objects shall either resolve the dispute, withdraw its objection, or petition to CEP for a lead agency determination within fifteen days of receiving the determination.

(5) To make the lead agency determination, an acting agency must determine to the best of its ability the other agencies with jurisdiction over the proposal. This can be done by requesting the information from a private application, or through consultation with the information centers established pursuant to RCW 90.62.120, within the Environmental Coordination Procedures Act of 1973 (ECPA).

. . . .

WAC 197-10-220 LEAD AGENCY DESIGNATION--PRIVATE PROJECTS REQUIRING LICENSES FROM MORE THAN ONE AGENCY, WHEN ONE OF THE AGENCIES IS A COUNTY/CITY. For proposals for private projects which require licenses from more than one agency when at least one of the agencies requiring a license is a county/city, the lead agency shall be the county/city within whose jurisdiction is located the greatest portion of the proposed project area, as measured in square feet. For the purposes of this section, the jurisdiction of a county shall not include the areas within the limits of cities or towns within such county.

WAC 197-10-230 LEAD AGENCY DESIGNATION--SPECIFIC PROPOSALS. Notwithstanding the lead agency designation criteria contained in WAC 197-10-205 through -225, the lead agency for proposals within the areas listed below shall be as follows:

. . . .

(5) For all private projects requiring a license or lease to use or affect state lands, the lead agency shall be the state agency managing the lands in question: PROVIDED, That this subsection shall not apply to the sale or lease of state-owned tidelands, harbor areas or beds of navigable waters, when such sale or lease is incidental to a larger project for which one or more licenses from other state or local agencies is required.

. . . .

WAC 197-10-240 AGREEMENT AS TO LEAD AGENCY STATUS. Nothing herein shall prohibit an agency from assuming the role of lead agency as a result of an agreement among all agencies with jurisdiction.

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THRESHOLD DETERMINATION

WAC 197-10-300 THRESHOLD DETERMINATION REQUIREMENT. (1) Except as provided in subsection (2) hereof, a threshold determination shall be made for every proposal for a major action. The responsible official designated by the lead agency shall be responsible for making the threshold determination. Only the lead agency shall make a threshold determination, except when lead agency duties are shared or assumed pursuant to WAC 197-10-245 and -345, respectively.

(2) The threshold determination requirement of completion of an environmental checklist may be omitted, unless pre-draft consultation occurs, when:

(a) Both the responsible official and the sponsor (public or private) of a proposal agree that an EIS is required, or

(b) The sponsor of the proposal and the lead agency are the same entity and decides that an EIS is required.

(3) When the provisions of subsection (2) above have been utilized, compliance with the requirements for use of the environmental checklist

contained in WAC 197-10-305 through -390 may be disregarded.

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WAC 197-10-310 THRESHOLD DETERMINATION PROCEDURES--ENVIRONMENTAL CHECKLIST. (1) An environmental checklist substantially in the form provided in WAC 197-10-365 shall be completed for any proposed major action before making the threshold determination. The proposal's proponent shall complete the checklist either alone or together with the lead agency. Explanations of every "yes" and "maybe" answer on the checklist shall be provided, and persons completing the checklist may provide explanations of "no" answers. Persons filling out an environmental checklist may make reference to studies or reports which are available to the agency to which the checklist is being submitted.

(2) An environmental checklist may be required by an acting agency receiving an application for a major action, or (if one has not been previously completed) shall be required by the lead agency prior to making the threshold determination.

(3) No environmental checklist or threshold determination is required for proposals that are exempted by WAC 197-10-170, -175 and -180.

WAC 197-10-320 THRESHOLD DETERMINATION PROCEDURES--INITIAL REVIEW OF ENVIRONMENTAL CHECKLIST. (1) The lead agency shall conduct an initial review of the environmental checklist for the proposal together with any supporting documentation. This initial review shall be made without requiring further information from the applicant. In making this initial review, the lead agency shall independently evaluate each item on the checklist and indicate thereon the results of this evaluation.

(2) After completing the initial review of the environmental checklist, the lead agency shall apply the criteria of WAC 197-100-060 and -360 to the checklist as evaluated by the lead

agency. This process will lead to one of three determinations:

(a) The proposal will not have a significant adverse impact upon the quality of the environment; in which case, the lead agency shall initiate the negative threshold determination procedures of WAC 197-10-340; or,

(b) The proposal will have a significant adverse impact upon the quality of the environment; in which case the lead agency shall initiate the EIS preparation procedures of WAC 197-10-350 and -400 through -695; or,

(c) There is not sufficient information available to the lead agency to enable it to reasonably make a determination of the environmental significance of the proposal; in which case the lead agency shall implement one or more of the information gathering mechanisms in WAC 197-10-330.

WAC 197-10-330 THRESHOLD DETERMINATION PROCEDURES--INFORMATION IN ADDITION TO CHECKLIST. (1) The threshold determination by the lead agency must be based upon information reasonably sufficient to determine the environmental impact of a proposal. In the event that the lead agency determines the information available to it is not reasonably sufficient to make this determination, one or more of the following may be initiated:

(a) The applicant may be required to furnish further information. This additional information shall be limited to those categories on the environmental checklist. An applicant may be required to provide explanations of any "no" answers to questions on the checklist.

(b) The lead agency may initiate further studies, including physical investigations on the subject property, directed toward providing additional information on the environmental impacts of the proposal.

(c) The lead agency may consult with other agencies with jurisdiction over the proposal, requesting substantive information as to potential environmental impacts of the proposal which lie

within the area of expertise of the particular agency so consulted. Agencies so consulted shall respond in accordance with the requirements of WAC 197-10-500 through -540.

(2) When, during the course of collecting further information on a proposal, the lead agency obtains information reasonably sufficient to assess the adverse environmental impacts of the proposal, it shall immediately make the threshold determination utilizing the criteria of WAC 197-10-360 and -365. In the event that the further investigations authorized by this section do not provide information reasonably sufficient to assess any potential adverse environmental impacts of the proposal, an EIS shall be prepared.

WAC 197-70-340 THRESHOLD DETERMINATION PROCEDURES--NEGATIVE DECLARATIONS. (1) In the event the lead agency determines a proposal will not have a significant adverse impact on the quality of the environment, it shall prepare a proposed or final declaration of non-significance, as appropriate, substantially in the form provided in WAC 197-10-355.

(2) The lead agency shall prepare a final declaration of non-significance for all proposals except for those listed in subsection (3) below.

(3) A lead agency making a threshold determination of non-significance for any of the following proposals shall prepare a proposed declaration of non-significance, and comply with the requirements of subsection (4) through (6) below prior to taking any further action on the proposal:

(a) Proposals for which there is another agency with jurisdiction.

(b) Proposals involving demolition of any structure or facility not exempted by WAC 197-10-170(1)(n) or -180.

(c) Proposals involving issuance of clearing or grading permits not exempted by WAC 197-10-170, -175 or -180.

(4) The lead agency shall list all proposed declaration of non-significance in the "Proposed Declaration of Non-Significance Register" at its SEPA public information center. All such declarations shall be attached to the environmental checklist as evaluated by the lead agency and transmitted to any other agencies with jurisdiction and to the SEPA public information center of the lead agency.

(5) Any person or agency may submit written comments on the proposed declaration of non-significance to the lead agency within fifteen days from the date of its listing in the register. The lead agency shall take no further action on the proposal which is the subject of the proposed declaration of non-significance for fifteen days from the date of its listing in the register. If comments are received, the lead agency shall reconsider its proposed declaration in light thereof: however, the lead agency is not required to modify its proposed declaration of non-significance to reflect the comments received thereon.

(6) After the fifteen day time period has elapsed, and after considering any comments, the lead agency shall either adopt its proposed declaration as a "Final Declaration of Non-Significance," or determine that the proposal is significant, or utilize the additional information gathering mechanisms of WAC 197-10-330(1).

(7) Issuance of proposed and final declarations of non-significance completes the procedural requirements of these guidelines unless another agency with jurisdiction assumes lead agency duties and reponsibilities pursuant to WAC 197-10-345.

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WAC 197-10-350 AFFIRMATIVE THRESHOLD DETERMINATION. (1) In the event the lead agency determines that the proposal will have a significant adverse effect upon the quality of the environment, it shall prepare a declaration of significance using the form WAC 197-10-355 which

shall be retained in the files of the lead agency. The lead agency shall then list the proposal in the "EIS in Preparation Register" maintained at the SEPA public information center of the lead agency, and then begin the EIS preparation brochures of WAC 197-10-400 through -695.

(2) After the additional information gathering mechanisms of WAC 197-10-330 have been utilized, and when there exists a reasonable belief by the lead agency that the proposal could have a significant adverse impact, the procedure contained in subsection (1) above shall also be followed.

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WAC 197-10-360 THRESHOLD DETERMINATION CRITERIA--APPLICATION OF ENVIRONMENTAL CHECKLIST. (1) The lead agency shall apply the questions in the environmental checklist to the total proposal, including its indirect effects [See WAC 197-10-060], to determine whether the proposal will result in a significant adverse impact upon the quality of the environment. The threshold decision shall be based solely upon this process. The questions contained in the environmental checklist are exclusive, and factors not listed therein shall not be considered in the threshold determination.

(2) The questions in the environmental checklist are not weighted. It is probable there will be affirmative answers to several of these questions while the proposal would still not necessarily have a significant adverse impact; however, a single affirmative answer could indicate a significant adverse impact, depending upon the nature of the impact and location of the proposal. The nature of the existing environment is an important factor. The same project may have a significant adverse impact in one location, but not in another location. The absolute quantitative effects of the proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment. The lead agency shall also be alert to the possibility that several marginal impacts when taken together

will result in a significant adverse environmental impact. For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted. If, after the lead agency has utilized the additional information gathering mechanisms of WAC 197-10-330, the impacts of the proposal are still in doubt, and there exists a reasonable belief by the lead agency that the proposal could have a significant adverse impact, an EIS is required.

(3) It should also be remembered that proposals designed to improve the environment (such as sewage treatment plants or pollution control requirements) may also have adverse environmental impacts. The question at the threshold determination level is not whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather if the proposal involves any significant adverse impacts upon the quality of the environment. If it does, an EIS is required. No test of balance shall be applied at the threshold determination level.

(4) Additional research or field investigations by either the lead agency or by the private applicant is required when the information available to the lead agency is not sufficient for it to make a determination of the potential adverse environmental impacts [See WAC 197-10-330]. It is expected, however, that many proposals can be evaluated entirely through an office review [See WAC 197-10-320] of the environmental checklist, and that for other proposals, the majority of the questions in the environmental checklist may be answered in the same manner.

WAC 197-10-365 ENVIRONMENTAL CHECKLIST. (1) The form in subsection (2) hereof is the environmental checklist. Agencies may at their option revise the format of this form; however, the language of the questions shall not be changed. The questions appearing in the environmental

checklist are exclusive, and considerations which do not appear in it or in WAC 197-10-360 shall not be used in making a threshold determination. This checklist does not supersede or void application forms required under any federal or state statute or local ordinance, but rather is supplementary thereto.

(2) Environmental checklist form:

Introduction: The state Environmental Policy Act of 1971, Chapter 43.21C, RCW, requires all state and local governmental agencies to consider environmental values both for their own actions and when licensing private proposals. The Act also requires that an EIS be prepared for all major actions significantly affecting the quality of the environment. The purpose of this checklist is to help the agencies involved determine whether or not a proposal is such a major action.

Please answer the following questions as completely as you can with the information presently available to you. Where explanations of your answers are required, or where you believe an explanation would be helpful to government decision makers, include your explanation in the space provided, or use additional pages if necessary. You should include references to any reports or studies of which you are aware and which are relevant to the answers you provide. Complete answers to these questions now will help all agencies involved with your proposal to undertake the required environmental review without unnecessary delay.

The following questions apply to your total proposal, not just to the license for which you are currently applying or the proposal for which approval is sought. Your answers should include the impacts which will be caused by your proposal when it is completed, even though completion may not occur until sometime in the future. This will allow all of the agencies which will be involved

to complete their environmental review now, without duplicating paperwork in the future.

NOTE: This is a standard form being used by all state and local agencies in the State of Washington for various types of proposals. Many of the questions may not apply to your proposal. If a question does not apply, just answer it "no" and continue on to the next question.

ENVIRONMENTAL CHECKLIST FORM

. . . .

	Yes	Maybe	No
(5) Fauna. Will the proposal result in:			
(a) Changes in the diversity of species of fauna (birds, land animals including reptiles, fish and shellfish, benthic organisms, insects or microfauna)?	___	_____	___
(b) Reduction of the numbers of any unique, rare or endangered species of fauna?	___	_____	___
(c) Introduction of new species of fauna into an area, or result in a barrier to the migration or movement of fauna?			
(d) Deterioration to existing fish or wildlife habitat?			

Explanation: _____

_____

. . . .

III. SIGNATURE

I, the undersigned, state that to the best of my knowledge the above inormation is true and complete. It is understood that the lead agency may withdraw any declaration of non-significance that it might issue in reliance upon this checklist should there be any willful misrepresentation or willful lack of full disclosure on my part.

Proponent: _____

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WAC 197-10-400 DUTY TO BEGIN PREPARATION OF A DRAFT EIS. After compliance with WAC 197-10-350, relating to preparation of a declaration of significance and the listing of the proposal in the "EIS in Preparation Register," the lead agency shall prepare the draft and final EIS in compliance with WAC 197-10-410 through -695.

WAC 197-10-470 PRE-DRAFT CONSULTATION PROCEDURES. (1) Pre-draft consultation is consultation by the lead agency with another agency with jurisdiction or expertise prior to completion of the draft EIS. Pre-draft consultation with another agency on proposals for private projects shall only be initiated by the lead agency when requested by a private applicant participating in the preparation of the draft EIS. Pre-draft consultation with another agency on public proposals may be initiated at the option of the lead agency.

(2) Pre-draft consultation is commenced when the lead agency sends to the consulted agency a packet of the following material related to the proposal:

(a) Any application for licenses for the proposal in the possession of the lead agency.

(b) A copy of the environmental checklist required by WAC 197-10-310, as reviewed pursuant to WAC 197-10-320.

(c) Any information in addition to the checklist resulting from application of WAC 197-10-330.

(d) Any other information deemed relevant to the proposal by the lead agency such as:

(i) Prior EIS's;

(ii) Portions of applicable plans or ordinances; or,

(iii) Prior scientific studies applicable to the site.

(3) Agencies so consulted will have forty-five days from receipt of the packet to respond in writing to the lead agency. The required contents of the consulted agency response are governed by WAC 197-10-500 through -540.

(4) The lead agency shall incorporate the relevant information received from other agencies during the pre-draft consultation stage into the draft EIS, by either summarizing the major findings which are contained in each of the consulted agency's responses or utilizing all of the data received. In the event the lead agency disagrees with any conclusion expressed in the information received from the consulted agency, the conclusion shall be set forth together with the position of the lead agency. The information required by this subsection may be placed wherever in the draft EIS the lead agency deems most appropriate. There is no requirement that either the draft or final EIS include responses to pre-draft consultation in a separate "response" section.

WAC 197-10-425 ORGANIZATION AND STYLE OF A DRAFT EIS. (1) The required contents of a draft EIS for proposals of both a project and non-project nature are set forth in WAC 197-10-440. The contents of a draft EIS prepared pursuant to that section shall be organized as set forth in subsections (2) and (3) of this section.

(2) Each draft EIS shall begin with an introduction, table of contents, distribution list, summary, and a description of the proposed action. The information contained in each section shall conform to the applicable requirements set forth in WAC 197-10-440(1) through -440(6). Organization variation is not permitted for these portions of the draft EIS.

(3) The organization and style of the remaining content of the EIS may be varied, at the option of the lead agency, from the format set forth in WAC 197-10-440(7) through (14): PROVIDED, That all of the subject matters required by WAC 197-10-440 shall be contained somewhere within the draft EIS.

(4) The lead agency that prepares a draft EIS should keep in mind that the purpose of a draft EIS is to aid decision-makers in considering

the significant environmental impacts of their decisions. This purpose is not served by EIS's which are excessively detailed and overly technical. Clarity and conciseness of presentation are of crucial importance in ensuring that EIS's prepared under these guidelines are considered and actually utilized in decision-making processes.

WAC 197-10-440 CONTENTS OF A DRAFT EIS. (1) The following subsections set forth the required contents of a draft EIS; PROVIDED, That where an agency is preparing a draft EIS in order to satisy the requirements of NEPA, as well as SEPA, and the regulations of the applicable federal agency require items in addition to that set forth below, then the contents of the draft EIS may be expanded as necessary to meet the requirements of that federal agency.

(2) Introduction. The following information shall be succinctly set forth at the beginning of the draft EIS:

(a) Action sponsor, and a brief (one or two sentence) description of the nature of the proposal and its location (street address, or nearest crossroads or cross-streets).

(b) Lead agency, responsible official, and the name and address of a contact person to whom comments, information and questions may be sent.

(c) Authors and principal contributors to the draft EIS and the nature or subject area of their contribution.

(d) List of all licenses which the proposal is known to require.

(e) Location of EIS background date.

(f) Cost to the public for a copy of the EIS pursuant to RCW 42.17.

(g) Date of issue of the draft EIS.

(h) Dates by which consulted agency and public comments must be received to be incorporated into the final EIS.

(3) Table of contents.

(4) Distribution list. The draft EIS shall include a list of the names of all agencies, federal agencies, organizations and persons to whom the draft EIS will be sent upon publication [See WAC 197-10-460].

(5) Summary of the contents of the draft EIS. Each draft EIS shall contain a summary of its contents as an aid to the agency decision-makers. The lead agency is to bear in mind that agencies other than the lead agency may be utilizing the EIS as an aid in decision-making. Therefore, care should be taken to ensure that the scope of the summary and the EIS is sufficiently broad to be useful to those other agencies being requested to license or approve a proposal. The summary shall contain only a short restatement of the main points discussed in the EIS for each of the various subject areas. In the event impacts cannot be predicted with certainty, the reason for uncertainty together with the more likely possibilities should be concisely stated. In most cases it is expected that the summary will run two to five pages but it shall not be more than ten pages. The summary shall include a brief description of the following:

(a) The proposal, including the purpose or objectives which are sought to be achieved by the sponsor.

(b) The direct and indirect impacts upon the environment which may result from the proposal.

(c) The alternatives considered, together with any variation in impacts which may result from each alternative.

(d) Measures which may be effectuated by the applicant, lead agency, or other agency with jurisdiction to mitigate or eliminate adverse impacts which may result from the proposal.

(e) Any remaining adverse impacts which cannot or will not be mitigated.

(6) Description of the proposal. The draft EIS shall include a description of the total proposal, including, but not limited to, the following:

(a) The name of the proposal and sponsors.

(b) The location of the project, or area affected by a non-project action, including an address, if any, and a legal description: PROVIDED, That where the legal description is by metes and bounds, or is excessively lengthy, a map, in lieu of a legal description, shall be included which enables a lay person to precjsely understand the location of the proposal.

(c) Reference to the file number, if known, of any other agencies involved so the proposal's location may be identified with precision by the consulted agency.

(d) If the proposal involves phased construction over a period of time, the timing of each construction phase should be identified; and if it is anticipated that later phases of the proposal will require future environmental analyses, these should be identified.

(e) A description of the major physical and engineering aspects of the proposal. This description should be tailored to the environmental impacts later discussed, with those physical aspects of the proposal causing the greater impacts being given the more detailed description. Inclusion of detailed engineering drawings and technical data should normally be avoided. Material of this nature should be retained in agency files and supplied to consulted agencies upon request.

(f) A brief description of existing comprehensive land use plans and zoning regulations applicable to the proposal, and how the proposal is consistent and inconsistent with them.

(g) Within the general guidelines of this subsection, the lead agency has discretion to determine the content and level of detail appropriate to adequately describe the proposal.

(7) Existing environmental conditions. This section shall include the following:

(a) A general assessment of the existing environment, covering those areas of the environment listed in WAC 197-10-444.

(i) The level of detail used in presenting the existing environment should be proportionate to the impacts the proposal will have if approved.

(ii) Areas of the environment which are not relevant to the identified impacts need only be mentioned generally, or not at all.

(iii) Inventories of the species of flora and fauna present on the site should be avoided; rather, emphasis should be placed upon those species and habitats which may be significantly affected.

(iv) This subsection shall be brief, non-technical, and easily understandable by lay persons, and provide the necessary background for understanding the proposal's impacts.

(b) Specific reference shall be made to those inventories and data studies which provided the informational source for part or all of the contents of this subsection.

(8) The impact of the proposal on the environment. The following items shall be included in this subsection:

(a) The known impacts resulting from the proposal within any element of the environment listed in WAC 197-10-444, the effects of which are either known to be, or which may be significant (whether beneficial or adverse), shall be discussed in detail; impacts which are potential, but not certain to occur, shall be discussed within reason.

(b) Elements of the environment which will not be significantly affected shall be marked "N/A" (not applicable) as set forth in WAC 197-10-444(1).

(c) Direct and indirect impacts of the total proposal, as described in subsection (8)(a) above shall be examined and discussed (for example, cumulative and growth-inducing impacts).

(d) The possibility that effects upon different elements of the environment will interrelate to form significant impacts shall be considered.

(9) The relationship between local short-term uses of man's environment and maintenance and enhancement of long-term productivity. The following items shall be included in this subsection:

(a) An identification of the extent to which the proposal involves trade-offs between short-term gains at the expense of long-term environmental losses.

(i) The phrases "short-term" and "long-term" do not refer to any fixed time periods, but rather are to be viewed in terms of the significant environmental impacts of the proposal.

(ii) Impacts which will narrow the range and degree of beneficial uses of the environment or pose long-term risks to human health shall be given special attention.

(b) A discussion of the benefits and disadvantages of reserving for some future time the implementation of the proposal, as opposed to possible approval of the proposal at this time.

(i) The agency perspective should be that each generation is, in effect, a trustee of the environment for succeeding generations.

(ii) Particular attention should be given to the possibility of foreclosing future options or alternatives by implementation of the proposal.

(10) Irreversible or irretrievable commitments of resources. The following items shall be included in this subsection:

(a) An identification of all substantial quantities of natural resources, including sources of energy and non-renewable materials, which will be committed by the proposal on a permanent or long-term basis. Commitment of natural resources also includes the lost opportunities to make other uses of the resources in question.

(b) This subsection may be integrated with subsection (9) above in order to more usefully present the information required by both sections.

(11) Adverse environmental impacts which may be mitigated. The following items shall be included in this subsection:

(a) A description of reasonable alterations to the proposal which may result in avoiding mitigating or reducing the risk of occurrence of any adverse impacts upon the environment.

(b) Energy conservation measures, including more efficient utilization of conventional techniques (e.g., insulation) as well as newer methods.

(c) Each alternative discussed in (a) and (b) above shall be evaluated in terms of its effect upon the environment, its technical feasibility, and its economic practicability.

(12) Alternatives to the proposal. This subsection shall include the following items:

(a) A description and objective evaluation of any reasonable alternative action which could feasibly attain the objective of the proposal.

(i) Reasonable alternatives shall include any action which might approximate the proposal's objective, but at a lower environmental cost or decreased level of environmental degradation.

(ii) Reasonable alternatives may be those which are capable of being effected by either the lead agency or other agency having jurisdiction.

(b) The "no-action" alternative shall be evaluated and compared to the other alternatives.

(c) The adverse environmental effects of each alternative shall be identified.

(d) The analysis of alternatives should be sufficiently detailed to permit a comparative evaluation of each alternative and the proposal as described in subsection (6) of this section.

(e) In those instances where the proposal is for a private project on a specific site, the alternatives considered shall be limited to the "no-action" alternative plus other reasonable alternative means of achieving the objective of the proposal on the same site or other sites owned or controlled by the same proponent (which may include only alterations for mitigation under subsection

(11) of this section). This limitation shall not apply when the project proponent is applying for a rezone or contract rezone.

(f) Subsection (12) may be integrated with subsection (11) of this section in order to more usefully present the information required by both subsections.

(g) The use of the term "reasonable" is intended to limit both the number and range of alternatives that shall be described and evaluated in this subsection, as well as the amount or level of detail which the EIS shall employ for each alternative that is discussed and evaluated.

(13) Unavoidable adverse impacts. This subsection shall include the following items:

(a) A listing of those impacts included in subsection (8) of this section which are adverse but cannot, or will not, be mitigated or avoided by modifications to the project.

(b) For any impact discussed in subsection (8) of this section which is determined to be non-adverse, the rationale for such determination shall be clearly stated.

(c) [Optional] A discussion of the relationship between the costs of the unavoidable adverse environmental impacts which will result from the implementation of the proposed action.

(14) Other issues. A draft EIS may contain a section labeled "Other Issues" within which those other problems and issues not pertaining to any element listed in WAC 197-10-444, but which are relevant to the proposal, shall be identified. The section shall be limited to a brief identification of such problems or issues. The lead agency may adopt guidelines that delineate the problems or issues identified under this subsection. [See WAC 197-10-446]

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WAC 197-10-444 LIST OF ELEMENTS OF THE ENVIRONMENT (1) Every EIS shall have appended to it a list of the elements of the environment in subsection (2), (3) and (4) of this section.

The lead agency shall place "N/A" ("not applicable") next to an item when the proposal, including its indirect impacts, will not significantly affect the area (or subarea) of the environment in question. Items marked "N/A" need not be mentioned in the body of the EIS. Subsection (2) and (3) of this section correspond in subject matter to the questions contained in the environmental checklist used for threshold determination, and the questions in the checklist may be used to interpret this outline listing.

(2) ELEMENTS OF THE PHYSICAL ENVIRONMENT.

. . . .

(e) Fauna.
(i) Numbers or diversity of species.
(ii) Unique species.
(iii) Bariers and/or corridors.
(iv) Fish or wildlife habitat.

. . . .

WAC 197-10-455 CIRCULATION OF THE DRAFT EIS--REVIEW PERIOD. (1) A consulted agency shall have a maximum of thirty-five days from the date of listing of the proposal in the "EIS Available Register" in which to review the draft and forward its comments and information with respect thereto to the lead agency. If a consulted agency with jurisdiction requires additional time to develop and complete new data on the proposal, a fifteen day extension may be granted by the lead agency. Extensions may not be granted for any other purpose.

(2) There shall be allowed a period of thirty-five days from the date of the listing of the proposal in the "EIS Available Register" for the public to forward to the lead agency any comments upon or substantive information related to the proposal and the draft EIS.

WAC 197-10-460 SPECIFIC AGENCIES TO WHICH DRAFT EIS SHALL BE SENT. (1) A copy of each draft EIS shall be mailed no later than the day that it is listed in the "EIS Available Register" to the following:

(a) The department of ecology.

(b) Each federal agency having jurisdiction by law over a proposed action.

(c) Each agency having jurisdiction by law over, or environmental expertise pertaining to a proposed action, as defined by WAC 197-10-040 and -465 (required by RCW 43.21c.030(2)(d).

(d) Each city/county in which adverse environmental effects identified in the draft EIS may occur if the proposed action is implemented. (This subsection does not apply to draft EIS's for non-project actions.)

(e) Each local agency or political subdivision which will be required to furnish additional public services as a result of implementation of the proposed action.

(f) The applicable regional planning commission, regional clearinghouse, statewide clearinghouse, or area-wide council of government which has been designated to review and coordinate local governmental planning under the A-95 review process and other federal regulations and programs [See RCW 36.64.080, RCW 35.63.070 and RCW 36.70.070].

(g) The lead agency's SEPA public information center.

(h) [Optional] Any person, organization or governmental agency that has expressed an interest in the proposal, is known by the lead agency to have an interest in the type of proposal being considered, or receives governmental documents (e.g., local and regional libraries) may be sent a copy of the draft EIS.

(2) An agency that receives a copy of the draft EIS does not become a "consulted agency" under these guidelines due to that factor alone. [See WAC 197-10-040, -465, -510 and -520 for those provisions that define a consulted agency.]

WAC 197-10-465 AGENCIES POSSESSING ENVIRONMENTAL EXPERTISE. The following agencies shall be regarded as possessing special expertise relating to those categories of the environment under which they are listed:

(3) Fish and wildlife.
(a) Department of game.
(b) Department of fisheries.
(c) Oceanographic commission (marine waters).

. . . .

(7) Natural resources development.
(a) Department of commerce and economic development.
(b) Department of ecology.
(c) Department of natural resources.
(d) Department of fisheries.
(e) Department of game.
(f) Oceanographic commission (related to marine waters).

. . . .

(9) Land use and management.
(a) Department of commerce and economic development.
(b) Department of ecology.
(c) Department of fisheries (affecting surface or marine waters).
(d) Department of natural resources (tidelands or state-owned or -managed lands).
(e) Office of community development.

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WAC 197-10-480 PUBLIC HEARING ON A PROPOSAL --WHEN REQUIRED. (1) If a public hearing on the proposal is held pursuant to some other requirement of law, such hearing shall be open to consideration of the environmental impact of the proposal, together with any available environmental document.

(2) In all other cases a public hearing on the environmental impact of a proposal shall be held whenever one or more of the following situations occur:

(a) The lead agency determines, in its sole discretion, that a public hearing would assist the lead agency in meeting its responsibility to implement the purposes and goals of SEPA and these guidelines; or,

(b) When fifty or more persons residing within the jurisdiction of the lead agency, or who

would be adversely affected by the environmental impact of the proposal, make written request to the lead agency within thirty-five days of the listing of the proposal in the "EIS Available Register;" or,

(c) When two or more agencies with jurisdiction over a proposal make written request to the lead agency within thirty-five days of the listing of the proposal in the "EIS Available Register."

(3) Whenever a public hearing is held under subsection (2) of this section, it shall occur no later than fifty-one days from the listing of the proposal in the "EIS Available Register" and no earlier than fifteen days from such date of listing.

WAC 197-10-485 NOTICE OF PUBLIC HEARING ON ENVIRONMENTAL IMPACT OF THE PROPOSAL. (1) Notice of all public hearings to be held pursuant to WAC 197-10-480(2) shall be published in a newspaper of general circulation in the area where the project will be implemented. For non-project actions the notice shall be published in the general area where the lead agency has its principal office. The notice shall be published no later than five days preceding the hearing. For non-project proposals having regional or statewide applicability, copies of the notice shall be transmitted to the Olympia bureaus of the associated press and united press international.

(2) A notation of the hearing date and location shall be entered in the "EIS Available Register" maintained at the lead agency's SEPA public information center.

WAC 197-10-490 PUBLIC HEARING ON THE PROPOSAL --USE OF ENVIRONMENTAL DOCUMENTS. Whenever a public hearing is held on the environmental impact of a proposal, it shall be open to discussion of all environmental documents and any written comments which have been received by the lead agency prior to the hearing. A copy of the draft EIS shall be made available for public inspection at the public hearing.

WAC 197-10-495 PREPARATION OF AMENDED OR NEW DRAFT EIS. (1) A lead agency shall prepare an amended or new draft EIS whenever it determines:

(a) That substantial changes have been made in the proposal, or significant new information concerning anticipated environmental impacts has become available subsequent to circulation of the initial draft EIS, and

(b) That circulation of a new draft EIS is necessary to provide further input and review on the proposal.

(2) In such event, the lead agency shall follow the provisions of WAC 197-10-450 through -490 for the amended or new draft EIS.

WAC 197-10-500 RESPONSIBILITIES OF CONSULTED AGENCIES--LOCAL AGENCIES. Each local agency, when responding to a consultation request prior to a threshold determination, participating in pre-draft consultation, or reviewing a draft EIS, shall provide to the lead agency that substantive data, information, test results and other material which it possesses relevant to its area of jurisdiction, to the services it will provide, or to the impacts upon it associated with the proposal. Field investigations are not required of local consulted agencies. Local agencies are not required to transmit information which has been previously transmitted to the lead agency, or which is already reflected in the draft EIS.

WAC 197-10-510 RESPONSIBILITIES OF CONSULTED AGENCIES--STATE AGENCIES WITH JURSIDICTION. Each state agency with jurisdiction, when responding to a consultation request prior to a threshold determination, participating in pre-draft consultation, or reviewing a draft EIS shall immediately begin the research and, if necessary, field investigations which it would normally conduct in conjunction with whatever license it requires for a proposal; or, in the event no license is involved the agency with jurisdiction shall investigate the impacts of the activity it will undertake which gives it jurisdiction over a portion of the

proposal. The end result of these investigations should be that each agency with jurisdiction will be able to transmit to the lead agency substantive information on those environmental impacts of the proposal which are within the scope of the license or activity of the agency with jurisdiction. An agency with jurisdiction, in its response to the lead agency, should also indicate which of the impacts it has discovered may be mitigated or avoided and how this might be accomplished, and describe those areas of environmental risks which remain after it has conducted the investigations that may have been required.

WAC 197-10-520 RESPONSIBILITIES OF CONSULTED AGENCIES--STATE AGENCIES WITH ENVIRONMENTAL EXPERTISE. (1) Each state agency participating in pre-draft consultation, or reviewing a draft EIS, lacking jurisdiction, but possessing environmental expertise pertaining to the impacts associated with a proposal [see WAC 197-10-465], when requested by the lead agency, shall provide to the lead agency that substantive data, information, test results or other material relevant to the proposal which the consulted agency then possesses relating to its area of special expertise. (2) The consulted agency may at its option investigate, develop and transmit whatever additional information is necessary for the lead agency to meet its responsibilities under WAC 197-10-440 or -442.

WAC 197-10-530 RESPONSIBILITIES OF CONSULTED AGENCIES--WHEN PRE-DRAFT CONSULTATION HAS OCCURRED. When a consulted agency has engaged in the pre-draft consultation procedures set forth in WAC 197-10-410, the scope and depth of its required review and comment upon the draft EIS is limited to those appropriate and relevant matters which were not contained in its previous response (such as when significant new information becomes available which was not available to the consulted agency during the pre-draft consultation stage).

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WAC 197-10-540 LIMITATIONS ON RESPONSES TO CONSULTATION. In those instances where part or all of the relevant data possessed by any consulted agency is either voluminous in nature, extremely bulky or otherwise incapable of ready transmittal to the lead agency, or consists of a report or document published by another agency, or represents a standard text or other work obtainable at a public library, such data or information may be clearly identified or cited by the consulted agency in its comments to the lead agency and the data itself need not be transmitted. When the consulted agency identifies relevant data, files or other material pursuant to this section, it shall describe briefly the nature of such information and clearly indicate its relevance to the environmental analysis of the proposed action in question. If the details of the proposal supplied with the consultation request are not sufficient to allow a complete response, the consulted agency shall be required to transmit only that information it is capable of developing from the material sent to it with the consultation request.

WAC 197-10-545 EFFECT OF NO WRITTEN COMMENT. If a consulted agency does not respond with written comments within thirty-five days of the date of listing of the draft EIS in the "EIS Available Register," or fails to respond within the fifteen-day extension period which may have been granted by the lead agency, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal upon the subject area of the consulted agency's jurisdiction or special expertise. Any consulted agency which fails to submit substantive information to the lead agency in reponse to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with WAC 197-10-400 through -495, or with the contents of the final EIS.

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WAC 197-10-570 PREPARATION OF THE FINAL EIS--CONTENTS--WHEN NO CRITICAL COMMENTS RECEIVED ON THE DRAFT EIS. (1) If the lead agency does not receive any comments critical of the scope or content of the draft EIS, the lead agency may prepare a statement to the effect that no critical comments were received and circulate that statement in the manner prescribed in WAC 197-10-600.

(2) The statement prepared and circulated pursuant to subsection (1) above, together with the draft EIS (which is not recirculated with the statement), shall constitute the "final EIS" for the proposal: PROVIDED, That when the draft EIS was not circulated to the office of the governor or the ecological commission, then the draft EIS shall be attached only to the statement sent to these agencies.

WAC 197-10-580 PREPARATION OF THE FINAL EIS--CONTENTS--WHEN CRITICAL COMMENTS RECEIVED ON THE DRAFT EIS. (1) When the lead agency received any comments critical of the scope or content of the draft EIS, whether made in writing or made orally at any public hearing on the environmental impact of the proposal, it shall comply with either subsection (2) or (3) below.

(2) The lead agency may determine that no changes are required in either the draft EIS or the proposal, despite the critical comments that were received during the commenting period. The lead agency must prepare a document containing a general response to the comments that were received, the text or summary of written comments, and a summary of the oral comments made by the public at any hearing held on the proposal or its environmental impacts. The lead agency shall then circulate the document in the manner prescribed in WAC 197-10-600: PROVIDED, That when the draft EIS was not circulated to the office of the governor or the ecological commission, then the draft EIS shall be attached only to the statement sent to these agencies.

(3) The lead agency may determine that it is necessary and appropriate to rewrite the contents of the draft EIS in order to respond to critical comments received during the commenting period. In such instances, the lead agency shall circulate the re-written EIS in the manner specified in WAC 197-10-600. The lead agency shall ensure that the rewritten EIS evidences an affirmative response by the lead agency to the critical comments, or alternatively, contains a summary of those critical comments with which it does not agree.

(4) A document prepared and circulated pursuant to subsection (2) or (3) above shall constitute the "final EIS" for the proposal.

APPENDIX C

SHORELINE MASTER PROGRAM FOR THE THURSTON REGION DECEMBER 1975

SECTION II: AN EXPLANATION OF THE INTENT OF THE SHORELINE PROGRAM AND A GUIDE TO ITS USE

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The intent of the Shoreline Master Program is to guide the future development of shorelines within the Thurston Region (incorporated and unicorporated Thurston County). This Program is a combination policy plan, development plan, and standard-setting ordinance. It establishes general policies for all of the various use activities that make use of shorelands and waters (refer to the portion of Section III dealing with policies for regulation of use activities). Thes policies apply to all shoreline areas within the Thurston Region. They must be adhered to by any new development.

The Program is a development plan for shorelines in that it maps our varying intensities of use allowed on segments of shorelines, based on existing development patterns, biophysical capabilities and limitations of shoreline areas, and on the goals and aspirations of the citizens of the Region. This is accomplished by the designation of one of four "environments" on all shoreline areas (Natural, Conservancy, Rural, or Urban) plus the consideration of "shorelines of statewide significance," which are areas designated by the legislature and voters in the Shoreline Management Act of 1971 as requiring special concern. The reader is referred to the portions of Section III dealing with Shoreline Environments and Plan Elements for an explanation of the intent of each environment designation. The Environment Designation Maps in the back of the Program provide the designation of specific areas. The first five pages of Section VIII explain how to use the maps and give the criteria for application of environments.

The environment designation system is designed to encourage uses in each environment which enhance the character of that environment. The system should not be considered a substitute for local planning and zoning. Zoning may further refine the allocation of space and regulation of uses. For example, this Program may designate a large area "Urban" area into areas of use such as residential, commercial, or industrial. A local code, such as a sign ordinance, may be much more detailed than the general sign regulations contained in this Program: but the shoreline regulations take precedence when they are more restrictive than local zoning.

This Program also is a standard-setting ordinance. Regulations are included for the control of use activities within each environment and for those in shorelines of state-wide significance.

Section IV contains regulations which control use activities within each environment and for those in shorelines of state-wide significance. These regulations are intended to carry out the goals and policies for each environment as stated in Section III. They also consider the varied impact of activities on the different natural systems. The regulations carry the same legal weight as other local land use controls. Although some are not enforceable by the Shoreline Permit system (see Section VII) they may be enforced by local agencies such as building and health departments.

Shoreline uses or activities that are not specifically addressed in the regulations can be evaluated through the Permit system on a case-by-case basis and should be required to conform with the goals and policies stated by this Program as well as the spirit of the Shoreline Management Act of 1971.

Section VII (DEFINITIONS AND ADMINISTRATION) describes all administrative and legal aspects of

the Program, including the Permit system, variances and conditional uses, definitions, the amendment process, fees, appeals and penalties.

To demonstrate how this Program is to be used by a potential shoreline developer, the following example is given: A developer intending to sub divide an area near a river will obtain a Shoreline Master Program at the Planning Office of the municipality in which the development is to occur. The developer will turn to Section VIII (ENVIRONMENTAL DESIGNATION MAPS AND LEGAL BOUNDARIES), first reading directions on how to use the maps, then locating the proposed site on one of the maps. The map will indicate in which of the four environments the site lies. The developer will then turn to Section IV (REGULATIONS OF USE ACTIVITIES IN THE FOUR ENVIRONMENTS), and read the regulations pertaining to pertinent use activities in the Development Permit, and the Permit processing procedure, will be found subsequently in the Program, and the attending planner will provide assistance.

Although the regulations contained in Section IV will most ofter be referred to in the day-to-day use of the Master Program, Section III, containing goals and policies, will be used when interpretation of regulations is needed, or when particular activities are not specifically covered by the regulations. Persons responsible for administration of Shoreline Permits should be thoroughly familiar with Section III.

SECTION III

GOALS AND POLICIES AND MASTER PROGRAM STRUCTURE

GENERAL GOAL

The goal of this Master Program is to preserve to the fullest possible extent the scenic, aesthetic and ecological qualities of the shorelines of the Thurston Region in harmony with those uses which are deemed essential to the life and well-being of its citizens.

GENERAL POLICY

The local governments of Thurston County recognize that the shorelines of this County and the State are among the most valuable and fragile of its natural resources and that there is great concern throughout the County relating to their utilization, protection, restoration, and preservation. In addition, they hold that ever-increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of this Region. The local governments further hold that much of the shorelines of the Region and the uplands adjacent thereto are in private ownership: that unrestricted construction on the privately-owned or publicly-owned shorelines of the State is not in the best public interest: and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the State while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the State and Regional shorelines.

It shall be the policy of the local governments of Thurston County to provide for the management of the shorelines of the State and Region by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the State and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The management of shorelines of state-wide significance shall give preference to uses which:

(1) Recognize and protect the state-wide interest over local interest.
(2) Preserve the natural character of the shoreline.
(3) Result in long-term over short-term benefit.
(4) Protect the resources and ecology of the shoreline.
(5) Increase public access to publicly-owned areas of the shorelines.
(6) Increase recreational opportunities for the public on the shoreline.
(7) Protect life and property from hazards of flood.
(8) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of the Thurston Region Shoreline Management Master Program, the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the State and

Region shall be preserved to the greatest extent feasible consistent with the overall best interest of the people generally. To this end, uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment or are unique to or dependent upon use of the State's shoreline. Alterations of the natural condition of the shorelines, in those limited instances when authorized, shall be given priority for single-family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the Region; industrial and commercial developments which are particularly dependent on their location on, or use of, the shorelines of the Region; and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the Region. Permitted uses of the shorelines of the State and Region shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

IMPLEMENTING POLICIES

1. Public access to shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existed prior to establishment of public access.

2. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.

3. Future water-dependent industrial use shall be channeled into shoreline areas already so utilized or into those shoreline areas which lend themselves to suitable industrial development. Where industry is not located in shoreline areas that are more suited to other uses, it is the policy of this Master Program to minimize expansion of such industry.

4. Residential development shall be undertaken in a manner that will maintain existing public access to the publicly-owned shorelines and not interfere with the public use of water areas fronting such shorelines, nor shall it adversely affect aquatic habitat.

5. Governmental units shall be bound by the same requirements as private interests.

6. Applicants for Permits shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a Permit is granted. In any review of the granting or denial of an application for a Permit as provided in RCW 90.58.18.180(1), the person requesting the review shall have the burden of proof.

7. Shorelines of this Region which are notable for their aesthetic, scenic, historic or ecological qualities should be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions should be eliminated.

8. Protection of public health is recognized as a primary goal. All applications for development or use of shorelines shall be closely analyzed for their effect on the public health.

THE ENVIRONMENTS

The State of Washington Department of Ecology Final Guidelines for the Shoreline Management Act of 1971 establish a framework of four categories of shorelines, based on the degree of man's intrusion into the shoreline and the degree of uniqueness of the shoreline. These four categories are termed the "Natural, Conservancy, Rural, and Urban Environments."

1. Natural Environment

Purpose: The intent of a Natural Environment designation is to preserve, maintain or restore a shoreline as a natural resource existing relatively free of human influence, and to discourage or prohibit those activities which might destroy or degrade the essential, unique or valuable natural characteristics of the shoreline.

Definition: The "Natural Environment" designates shoreline areas in which unique natural systems and resources are to be preserved or restored. This environment is characterized by severely limited land and water use with little or no visual evidence of man-developed structures or occupancy. Development or utilization of soil, aquatic, and forest resources, as well as nonrenewable mineral and nonmineral resources is prohibited. Public access and recreation are limited to a degree compatible with the preservation or restoration of the unique character of this environment.

2. Conservancy Environment

Purpose: The intent of a Conservancy Environment designation is to protect, conserve and manage existing resources

and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization. The preferred uses are noncomsumptive of the physical and biological resources of the area and activities and uses of a nonpermanent nature which do not substantially degrade the existing character of the areas. Nonconsumptive uses are those uses which utilize resources on a sustained yield basis while minimally reducing opportunities for other future uses of the resources of the area.

Definition: The "Conservancy Environment" designates shoreline areas for the protection, conservation, and management of existing valuable natural resources and historic and cultural areas. This environment is characterized by low-intensity land use and moderate intensity water use with moderate to little visual evidence of permanent structures and occupancy. Sustained management of the pastoral, aquatic and forest resources, as well as rigidly controlled utilization of nonrenewable and other nonmineral resources which do not result in long-term irreversible impacts on the natural character of the environment are permitted. Intensity of recreation and public access may be limited by the capacity of the environment for sustained recreational use.

3. Rural Environment

Purpose: The primary purposes of the Rural Environment are to protect areas from urban expansion, restrict intensive developments along undeveloped shorelines, function as a buffer between urban areas, and maintain open spaces for recreational purposes

compatible with rural uses. New developments in a Rural Environment are to reflect the character of the surrounding area.

Definition: The "Rural Environment" designates shoreline areas in which land will be protected from high-density urban wxpansion and may funciton as a buffer between urban areas and the shorelines proper. This environment is characterized by low intensive l and use and moderate to intensive water use. Residential development does not exceed two dwellings per acre. Visual impact is variable with a moderate portion of the environment dominated by structures or impermeable surfaces. Intensive cultivation and development of the renewable soills, aquatic and forest resources, as well as limited utilization of nonrenewable mineral resources is permitted. Recreational activities and public access to the shoreline are encouraged to the extent compatible with other rural uses and activities designated for this environment.

4. Urban Environment

Purpose: The purpose of an Urban Environment designation is to obtain optimum utilization of the shorelines within urbanized areas by providing for intensive public and private urban uses and by managing development of affected natural resources.

Definition: The "Urban Environment" designates shorelines within urbanized areas which provide for intensive public use and which are developed in a manner that enhances and maintains shorelines for a multiplicity of urban uses. This environment is characterized by high-intensity land and

water use, visually dominated by man-made residential, commercial and industrial structures and developments. Both renewable and nonrenewable resources are fully utilized, and public access and recreation encouraged to the maximum compatible with the other activities designated in the environment.

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RESIDENTIAL DEVELOPMENT

Definition

Residential development means any physical activity undertaken on the land or water related to the provision of human dwelling facilities. It may include other activity having an indirect effect on the land and waters, such as legal division of real estate and the establishment of public or communal rights of use.

Policies

1. No residential development (except the construction by an owner, lessee or contract purchaser of a single-family residence for his own use or for the use of his family) should be permitted on shorelines or wetlands in Thurston County without preparation of an environmental assessment statement that takes into consideration site limiations (soil conditions, slope stability, topography, etc.) and animal and plant habitats.

2. Residential development on shorelines and wetlands should be designed for minimum environmental and visual impact.

3. Clustering of residential development to minimize environmental impact, and provide open spaces, should be encouraged.

4. Waterfrontage should be developed for common use of people living in a residential development, as opposed to continued dividing up of waterfront into private lots.

5. Public open space, as opposed to common open space, on the waterfront, should be acquired through mechanisms such as less-than-fee acquisition or fee-simple purchase. Common open space is not to be construed as public.

6. A minimum of vegetation should be removed from the waterfront, and should be restored sufficiently to prevent erosion.

7. Waste materials from construction should not be left on shorelines or beaches: they should be stored upland until proper disposal.

8. Density of residences should be consistent with the Environment in which they are located, as well as with the level of services available in the area. Proposed developments should not pose a threat to the groundwater supply, either through overpumping or contamination, nor should waste disposal systems, whether individual or collective, result in significant adverse environmental impact.

9. Any dwelling unit type on land should be permitted that is consistent with density and other zoning regulations for the area.

10. Residential structures should be constructed so as to minimize obstruction of views of the water from upland areas. High-rise structures should be spaced to provide considerable open area around each.

11. Residential development over water should not be permitted.

12. Residential development where permitted by flood mitigation practices should be of low intensity on flood plains, the allowable density based on the characteristics of the individual flood plain lands and flood proofing provisions.

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SHORELINE WORKS AND STRUCTURES

Definition

Bulkheads, seawalls, breakwaters, both rigid or floating, riprapping, jetties and groins of all types of construction used for protection of the shoreline fall under this definition. Piers, docks, floats, boathouses and other structures used for boat mooring, storage and servicing; recreational fishing, fish processing; commercial shipping and storage; fuel and rail transportation; boat and ship repair and construction are shoreline works. Other industrial plants and facilities are included where they are a foundation or adjunct of manufacturing, food processing, cold storage, or forest products.

Policies

1. Shoreline works and structures should be designed, located, constructed, and operated in such a manner as to cause minimal short-term, and no significant long-term adverse effect on fish, shellfish, waterfoul and wildlife habitats in areas where they are to be preserved and conserved.

2. Shoreline works and structures should be designed to have a minimal impact upon natural movement of sand and gravel.

3. Shoreline works and structures should be designed in the most compatible way with the aesthetic qualities of the surrounding shoreline.

4. Shoreline works and structures generally should not be permitted for the purpose of creating new land areas.

5. Open-piling or floating structures should be the preferred method of construction versus landfill.

6. Communal shoreline works and structures are preferred to the proliferation of individual shoreline works and structures.

7. Proposed shoreline works and structures should enhance existing public use of shorelines and waters.

8. Flood protection measures should not result in channelization.

9. The Criteria Governing the Design and Construction of Bulkheads, Landfills, and Marinas in Puget Sound, Hood Canal, and Strait of Juan de Fuca for Protection of Fish and Shellfish Resources issued by the Washington State Department of Fisheries (February 1971) should be followed.

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SECTION IV

REGULATIONS OF USE ACTIVITIES IN THE FOUR ENVIRONMENTS

NATURAL ENVIRONMENT REGULATIONS

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Archaeological Areas and Historic Sites

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5. Where known sites (as recorded by the Washington Archaeological Research Center or the State Historic Preservation Commission) are proposed for development, the local shorelines agency must consult these agencies for their recommendations, and may deny the shoreline Permit where the historic or archaeological value of the site outweighs the development value, if compensation is available.

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Residential Development

1. Residential development over water is not permitted.

2. Residential developers are required to indicate how they plan to preserve shore vegetation and control erosion during construction. Soil conditions, slope stability and topography of the site should be studied to determine the suitability of the project. Within the developer's plans there should be content pertaining to minimizing visual impact.

3. Sewage disposal facilities, as well as water supply facilities, must be provided in accordance with appropriate state and local health regulations. Storm drainage facilities should be separate, not combined with sewage disposal system.

4. Adequate water supplies shall be available so that the ground water quality and quantity will not be endangered by overpumping. Standards of the Department of Social and Health Services and the Department of Ecology should be observed in this matter.

5. No residential subdivision or cluster development shall be approved unless it provides a buffer strip of a least 10 feet upland from the ordinary high water mark to be held for common use by residents of the development.

6. Due to the greatly diverse frequency of probable flooding on the flood plainlands of Thurston Cunty (which may range from less than 10 to well over 100 years even within one geographic flood plain area), land use consisting of housing development shall be regulated accordingly. Residential development in river flood plains will be controlled by the following regulations:

   a. No Residential structures will be permitted in the river floodway.
   b. Residential development may be permitted in the 100 year flood plain outside the floodway, provided the first floor level is flood proofed or at least one foot above the elevation of the 100 year flood.

7. Multifamily residences will be prohibited. Single-family residences will be permitted subject to the following regulations:

a. Minimum lot area shall be ten acres. The minimum lot area shall be increased on sloping lots consistent with the following table.

Average Lot Slope	Percentage Increase in Minimum Lot Area
0-5%	0%
5-10%	30%
10-15%	80%
15-20%	100%
20+%	no bldg.

b. Minimum lot width at the property line nearest ordinary high water shall be 300 feet.
c. No residence shall be constructed closer than 100 feet from the ordinary high water mark.
d. No residence shall exceed a height of 35 feet above average grade level.
e. All utility systems shall be underground unless such undergrounding would be economically unfeasible, or significantly detrimental to the environment.
f. On shorelines exposed to tidal action and where the gound water is or may be used as a water supply, the level of the ground water table shall not be lowered nor intrusion of salt water be caused by the construction of drainage facilities or by pumping at excessive rates.
g. In constructing a residence in a Natural Environment, the removal of trees and other vegetation shall be kept to an absolute minimum. (This would prohibit cutting out areas for a view, lawn or garden.)

Road and Railroad Design and Construction

1. Construction of new roads or significant widening of existing roads shall be prohibited, except those that provide access to private residences or other activities permitted in the Natural Environment.

2. Private roads shall be no more than twelve (12) feet in width from shoulder to shoulder. Roadways may be widened to twenty-two (22) feet to provide turnouts. Turnouts may not be more than forty (40) feet in length nor located within three hundred (300) feet of another turnout.

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Shoreline Works and Structures

1. Shoreline works and structures are prohibited in the Natural Environment.

2. Bank stabilization by the planting of vegetation and placement of temporary or educational structures (which must be removed at the conclusion of the project) is permitted.

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CONSERVANCY ENVIRONMENT REGULATIONS

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Residential Development

1. Residential development over water shall not be permitted.

2. Residential developers shall be required to indicate how they plan to preserve shore vegetation, and to control erosion during construction. Soil conditions, slope stability and topography of the site should be studied to determine the suitability of the project. Within the developer's plans there should be content pertaining to minimizing visual impact.

3. Sewage disposal facilities, as well as water supply facilities, shall be provided in accordance with appropriate state and local health regulations. Storm drainage facilities should be separate, not combined with sewage disposal systems.

4. Adequate water supplies shall be available so that the ground water quality and quantity will not be endangered by overpumping. Standards of the Department of Social and Health Services and the Department of Ecology shall be observed in this matter.

5. No residential subdivision or cluster development shall be approved unless it provides access area(s) and pathway(s), as appropriate, upland from the ordinary high water mark to be held for common use by residents of the development.

6. Due to the greatly diverse frequency of probable flooding on the flood plain lands of Thurston County (which may range from less than 10 to well over 100 years even within one geographic flood plain area), land use consisting of housing development shall be regulated accordingly. Residential development in river flood plains will be controlled by the following regulations:

a. No residential structures will be permitted in the river floodway.
b. Residential development may be permitted in the 100 year flood plain outside the floodway, provided the first floor level is flood proofed or at least one foot above the elevation of the 100 year flood.

7. Multifamily residences shall be prohibited. Single-family residences may be permitted subject to the following regulations.

a. Minimum lot area shall be one unit per acre. For a lot having an average slope of 5% or less on less than one-third of the lot area, the minimum lot area shall be increased constistent with the following table:

Average Lot Slope	Percentage Increase in Minimum Lot Area
0-5%	0%
5-10%	25%
10-15%	75%
15-20%	100%
20+%	no bldg.

b. Minimum lot width at the property line nearest high water shall be 100 feet.
c. No residences shall be constructed closer than 100 feet from the ordinary high water mark or from the boundary line between a Conservancy and a Natural Environment.
d. No residential structure shall exceed a height of 35 feet above average grade level.

e. All utility systems shall be underground unless such undergrounding would be economically unfeasible, or significantly detrimental to the environment.
f. On shorelines exposed to tidal action and where the ground water is or may be used as a water supply, the level of the ground water table shall not be lowered nor intrusion of salt water be caused, by the construction of drainage facilities or by pumping at excessive rates.
g. The removal of nontoxic natural vegetation shall be kept to a minimum.

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Shoreline Works and Structures

1. Bulkheads may be constructed only to provide necessary protection to a residence or valuable historic site. "Necessary" shall mean that physical damage to the structure or historic site is imminent.

2. Bulkheads shall be prohibited on spits and bars.

3. Bulkheads shall be constructed as close to the bank as feasible.

4. Breakwaters will be permitted only for the protection of a public access, valuable natural resource, or a valuable historic site. They shall be floating structures, anchored in place.

5. Jetties and groins are to be permitted only as necessary to protect existing structures or works, or to conserve natural shoreline features which are threatened by unnatural errosions.

6. Flood protection measures, such as dikes, shall be located landward of the 100 year plain (see definition, Section VII).

7. Commercial or public docks or piers shall not be constructed on lake or marine waters withing 2,000 feet of another commercial or public dock or pier.

8. Landfill associated with piers or docks is to be prohibited.

9. On Conservancy lakes (land designation) private docks shall be a maximum of 9 feet in width and extend a maximum of 24 feet in length past the low water mark.

10. On Conservancy lakes (land designation) private boathouses on or over the water shall be prohibited.

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RURAL ENVIRONMENT REGULATIONS

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Residential Development

1. Residential development over water is not permitted.

2. Residential developers shall be required to indicate how they plan to preserve shore vegetation and control erosion during construction. Soil conditions, slope stability and topography of the site should be studied to determine the suitability of the project. Within the developer's plans there should be content pertaining to minimizing visual impact.

3. Sewage disposal facilities, as well as water supply facilities, are to be provided in accordance with appropriate state and local health regulations. Storm drainage facilities should be separate, not combined with sanitary sewage disposal systems.

4. Adequate water supplies shall be available so that the ground water quality and quantity will not be endangered by overpumping. Standards of the Department of Ecology should be observed in this matter.

5. No residential subdivision or cluster development shall be approved unless it provides an access area(s) and pathway(s), as appropriate, upland from the ordinary high water mark to be held for common use by residents of the development.

6. Due to the greatly diverse frequency of probable flooding on the flood plain lands of Thurston county (which may range from less than 10 to well over 100 years even within one geographic flood plain area), land use consisting of housing development shall be regulated accordingly. Residential development in river flood plains will be controlled by the following regulations:

   a. No residential structures will be permitted in the river floodway.
   b. Residential development may be permitted in the 100 year flood plain outside the floodway, provided the first floor level is flood proofed or at least one foot above the elevation of the 100 year plain.

7. Residential densities in this environment shall not exceed two dwelling units per acre, regardless of structural type. For a lot having an average slope of 5% or less on less than one third of the lot area, the minimum lot area shall be increased consistent with the following table:

Average Lot Slope	Percentage Increase in Minimum Lot Area
0-5%	0%
5-10%	25%
10-15%	50%
15-20%	100%
20+%	no bldg.

8. Lot coverage with impervious surfaces in this environment shall not exceed 30%.

9. Structures shall be set back from the ordinary high water mark 50 feet or the height of the building, whichever is greater.

10. The removal of nontoxic natural vegetation shall be kept to a minimum.

Road and Railroad Design and Construction

1. Nonrail roads and bridges shall be designed as low-speed, low-volume, two-lane facilities wherever practible.

2. American Public Works Association, and County and Washington State Highway Department design and construction standards shall be utilized for nonrail roads and bridges.

3. American Association of Railroads and Interstate Commerce Commission railroad and bridge

design standards shall be utilized for railroad construction.

4. Herbicides shall not be used to control roadside brush, but may be used to control noxious weeds.

5. Flood protection measures shall be permitted only to protect present structures or water-dependant facilities. Whenever a flood protection measure has been constructed to protect a present structure, that measure shall be removed after the abandonment or dilapidation of the structure, unless a new facility to go on the site will be water dependent.

6. Commercial or public docks or piers shall not be constructed on a lake or saltwater frontage within five hundred (500) feet of such an existing dock or pier.

7. Landfill associated with piers or docks is to be prohibited except those needed to protect shoreside abutments.

8. Where feasible, breakwaters shall not be constructed with fill material, but be floating structures anchored in place.

9. On Rural lakes (land designation) private docks shall be a maximum 9 feet feet [sic] in width and extend a maximum of 24 feet in length past the low water mark.

10. On Rural lakes, private boathouses are to be (in-on-over water) prohibited.

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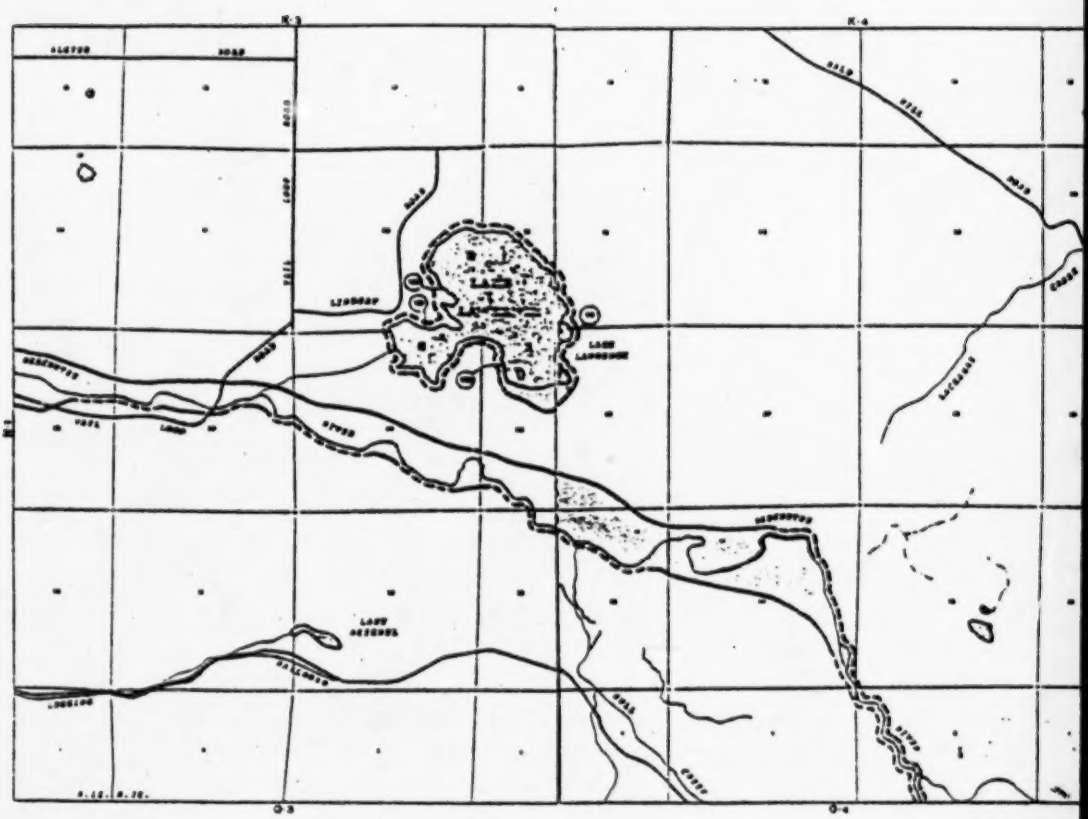
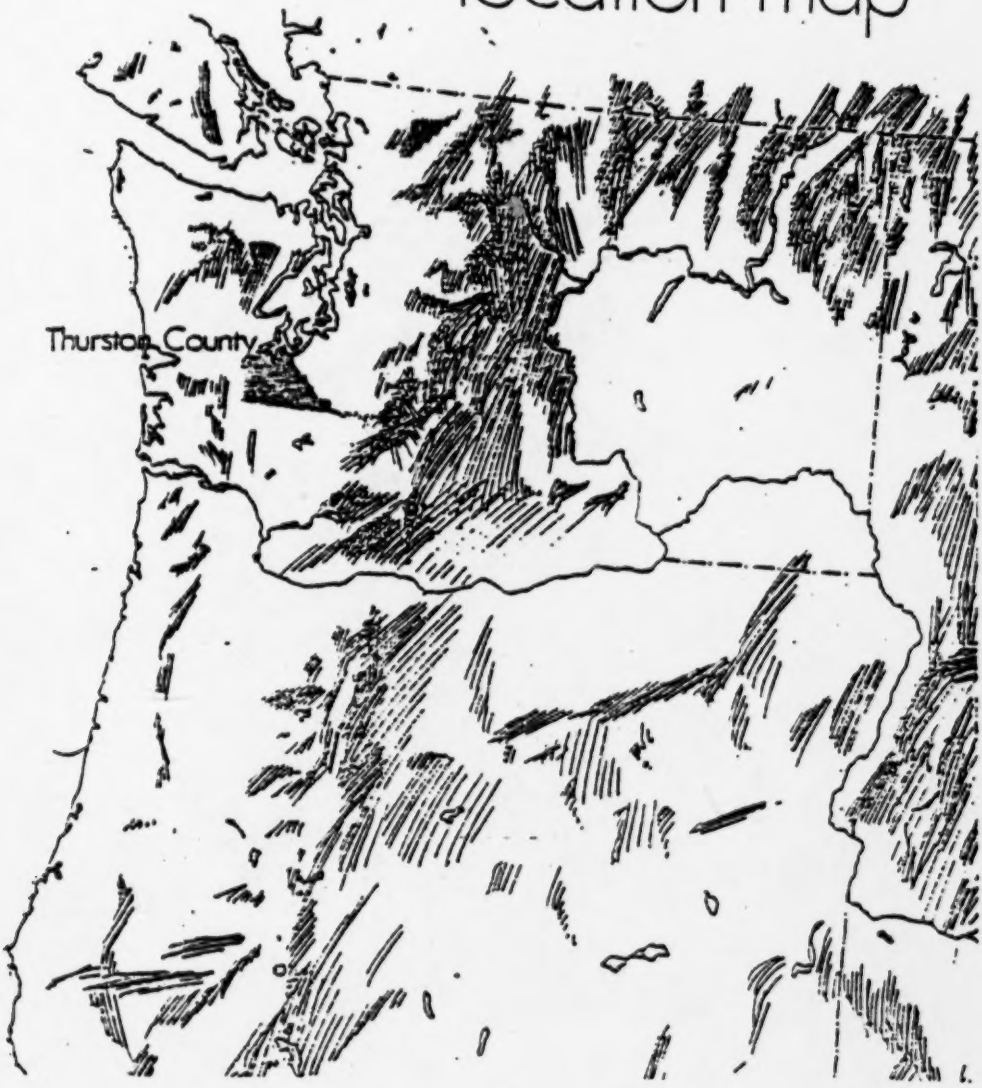


O·2 LAKE LAWRENCE

O·1 LAKE LAWREN

THURSTON COUNTY COMPREHENSIVE PLAN
Adopted by the Board of Thurston County
Commissioners on July 8, 1975
Prepared by
THURSTON REGIONAL PLANNING COUNCIL STAFF

THURSTON COUNTY
location map



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FOREWORD

Across the nation, more and more communities are relying upon planning for guidance in developing and implementing community improvement programs.

Here in Thurston County, many groups have been working to develop a comprehensive plan which will provide a framework for County decision making and establish a consensus regarding the desired future of Thurston County.

A PLAN is a generalized set of goals and policies that establish direction for optimum land use. As such, the Plan is an official statement of the County's long-range development policies. A plan does not have legal authority to implement its own provisions. Implementing ordinances and programs yet to be developed will accomplish this.

Some of the tools to help accomplish the objectives of the Plan will be a zoning map and ordinance, the existing subdivision ordinance, the official road program, public acquisition and construction programs, and the building code.

The Thurston County Comprehensive Plan has been written with the help of many, many individuals. The Thurston Regional Planning Council staff have synthesized information provided by the County Commissioners, the County Planning Commission, public officials, agency technicians, community planning groups, 1,300 concerned property owners, and student volunteers. Much work remains to be done in applying the general guidelines of this Plan to the specific communities. This will be accomplished through the development of sub-area plans that will become elements of the Comprehensive Plan. These plans initially will be generated by citizens and then reviewed by the Thurston County Planning Commission and the Board of County

Commissioners prior to their incorporation into the Comprehensive Plan for Thurston County.

Thus, this Plan is a beginning. It establishes a process that will be dynamic involving many participants in establishing and working to accomplish those objectives that will determine the future quality of life in Thurston County.

. . . .

SCOPE of the PLAN

FUNCTIONAL:

The Thurston County Planning Commission is authorized by the State Planning Enabling Act (RCW 36.70) to develop a Comprehansive Plan. This Plan includes the required elements of:

a. Land use--designating the proposed distribution of housing, commerce, industry, agriculture, timber and recreation.
b. Circulation--showing the location of major thoroughfares, transporation [sic] routes, utility lines, and major terminal facilities.

This Plan also is intended to include optional elements pertaining to:

a. The conservation of natural resources
b. Recreation
c. Public services
d. Housing
e. Capital improvement programming
f. Economic development

PHYSICAL:

This plan is concerned with all unincorporated County lands. Its emphasis is on those areas outside of the urban core (defined as that area around the three cities experiencing urban growth pressures). The Plan has included incorporated areas along with the unincorporated southern County for planning consideration. Planning for County lands within the urban core should be a product of the coordination of this Plan with the Comprehensive Plans of Lacey, Olympia, and Tumwater.

In this phase of the Thurston County Comprehensive Plan, rather complete attention has been given to the proposed Goals and Policies as well as the generalized optimal land use. What has been prepared is essentially a "Policy Plan" and a "Land Use Plan" with minimum provision of a "Circulation Plan" sufficient to satisfy statutory requirements.

Considerable attention has been given the many other Elements contained in a comprehensive plan through their discussion as Policies in the chapter on Goals and Policies. The sub-area plan phase of the County Comprehensive Plan will feature the preparation of sub-area plans and the addition of other elements such as Natural Resources and Economic Development.

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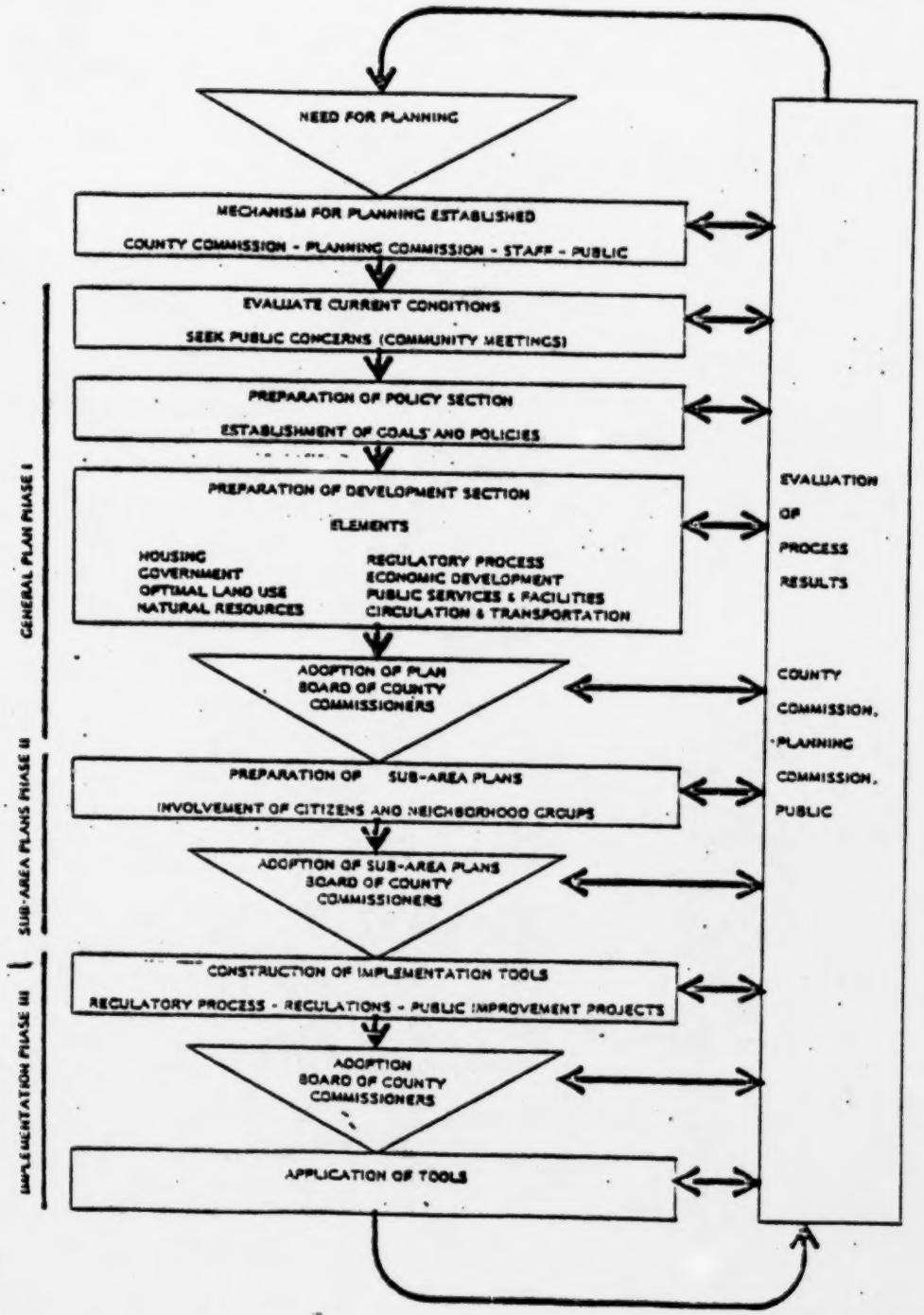
THE COMMUNITY PLANNING PROCESS



Implementation Phase

This phase has three components: First, the construction of implementation tools such as a regulatory process, land use regulations, and projects involving expenditure of public funds: second, adoption of these tools by ordinance or resolution in order to bring them into law: and third, application of these tools through consistent enforcement of the law and ongoing program administration. The implementation phase should answer these major issues:

1. How should growth and development be regulated?
   a. What regulations and procedures will best serve the County interest while protecting the rights of the individual?
   b. What performance standards will assure quality site development, clustering of compatible land uses, and separation of incompatible land uses?
2. What capital improvements, such as roads and utilities, will achieve land-use planning goals? What County programs will best accomplish identified goals?

Evaluation Phase

Too many times communities have had unsuccessful plans because no one has systematically evaluated the planning process. The Comprehensive Plan should be reviewed annually and revised as needed. Planning information should be updated continually. Indicators should be developed by which one can

tell whether or not goals are being achieved. Policies should be compared to legislative decisions to evaluate the degree to which the Plan is being implemented. Evaluation seeks to determine the degree to which existing policies, ordinances, and budgeting conform to the policies and land use in the County Comprehensive Plan; to identify existing disincentives which contradict planning goals and policies; to identify preferred administrative structure and actions (new policies, new legislation, capital investment and other program design) needed to implement Comprehensive Plan goals and policies. Community involvement is essential to a successful plan.

CHAPTER III

GOALS
&
POLICIES

Different goals will at times conflict with one another. The community will then have to weigh one goal against the other. This ongoing process of establishing, applying, weighing and evaluating community direction constitutes the planning process. The planning process is an open-ended process, one which never ends. The goals, policies, and proposed land use found herein along with the detailed studies which remain to be done should be continually evaluated and updated--Together they provide the framework for community decion [sic]-making.

The purpose, then, of the comprehensive planning process is to make rational decision-making possible in an atmosphere of fairness and due process for all persons involved in or affected by the decisions.

ENVIRONMENTAL QUALITY

GOAL: TO PRESERVE AND IMPROVE ENVIRONMENTAL QUALITY

POLICIES:

1. The capability of the land, water and air to sustain human activities should be a determining factor in making land use decisions. The Thurston County Land Capability Maps should be referred to when decsions on land subdivision, development, or zoning must be made.

2. Buildings should be located on sites which minimize the need for cutting, grading or the removal of native plant material.

   a. Land surface modifications should be compatible with natural features and processes.
   b. As much natural vegetation as possible, especially large trees, should be preserved as development occurs.

Discussion

Thurston County's physical character is a result of on-going dynamic physical and biological processes. Modification to the County's topography continues with seasonal variations as a result of the hydrologic cycle, the recycling of vital nutrients, and the ever increasing impact of human activities.

This plan is based on a premise that in order to preserve the quality environment of Thurston County it will be necessary to observe the limitations posed by the land, water, and air. Limitations of the land relate primarily to soils and geology interacting with topography and climate. Limitations of water pertain to both quality and quanity of surface and groundwater supplies. Air constraints refer both to air and noise pollution potential. Disregard of these limitations has in some cases produced undesirable situations ranging from raw sewage entering our surface waters to destruction of fish spawning grounds as a result of shoreline erosion.

3. Future growth should occur primarliy in the urban core, and the East Olympia, Rochester, Yelm, Rainier, and Tenino areas. County lands not in these growth areas should be developed at low densities.

Thurston County Planning Commission staff has produced a land capability study in which many of these limiting factors can be seen simultaneously. The study, made up of acetate overlay, cannot be reproduced for publication due to the scale and expense of the mapping. It is the original study which should be referred to in making land-use decisions and upon which the generalized maps in this document are based.

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NATURAL RESOURCES:

GOAL: TO MAINTAIN AND ENHANCE THURSTON COUNTY'S NATURAL RESOURCE BASE

Eight-five percent of Thurston County's land area is devoted to resouce management involving forestry, agriculture, fish and game, and mineral extraction. Among the many groups involved in resource management are the following: The Department of Natural Resources, the Thurston County Agriculture Extension Service, the Soil and Water Conservation District, the Washington Farm-Forestry Association, the Dairy Federation, the Cattleman's Association, the Blueberry Grower's Association, the Southwest Washington Wheat Association, the Sheep and Wool-Grower's Association, the Thurston County Weed Extermination District, the Oyster Growers Association and others.

All of the marine waters of the County except those of Budd Inlet support agua-culture activities. Most of the County's larger streams support major fish spawning. Although forest products are a major product of the County, in 1971 more than $7 million worth of eggs were produced compared to the more than $6 million worth of wood products. On the other hand, unmanaged well-stocked timber stands can yield a profit while agriculture demands continued attention and, in an increasingly competitive market, higher capital outlays for less return.

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NATURAL RESOURCES:

GOAL: TO MAINTAIN AND OPTIMIZE ANNUAL TIMBER PRODUCTION ON A SUSTAINED YIELD BASIS WHILE PROTECTING WILDLIFE HABITAT AND PROVIDING PUBLIC RECREATIONAL OPPORTUNITIES

POLICIES:

1. Fringe areas next to commercial forest lands should be protected from encroachment of any but low-intensity uses.

2. Private, non-industry forest owners should be encouraged to retain their lands in timber production and utilize tax relief programs.

3. Large forest owners should be encouraged to provide basic trail or camping facilities for the public.

Discussion

Thurston County is unique for its excellent timber-growing capacity. Today more than 60% of the County is used for commercial Forestry both by public and private interests. The major groups involved in forestry are: the Department of Natural Resources, the U.S. Army (Fort Lewis), Weyerhaeuser, Simpson, Scott, Boise Cascade and Port Blakely timber companies. Several large non-industry ownerships also exist. Small private owners have sold forest areas for use as residential, commercial, and industrial developments. Employment in lumber and wood products decreased from nearly 1,700 in 1958 to less than 750 in 1970. Two major county mills closed in 1966 and none of the three major timber companies have mills in Thurston County. Ten years ago milled lumber was a primary export from the Port of Olympia: by 1968 more than 95% of the exports were raw logs.

NATURAL RESOURCES:

GOAL: TO IDENTIFY AND PRESERVE WILDLIFE HABITAT IN THURSTON COUNTY.

POLICIES:

1. A fish and wildlife habitat inventory and management plan should be developed.

2. Significant habitats should be protected and managed.
   a. Marshes, swamps and bogs one acre or larger in size and covered with water for more than 9 months should be preserved in their natural state. Any alteration of natural marsh, swamp or bog smaller than one acre covered by water for more than 9 months should occur only after is is determined that such action will not result in significant damage to hydrologic systems or the environment.
   b. Property-owners whose land provides significant habitat are encouraged to enroll under the Open Space Tax Act.
   c. Research on conservation easements, cooperative agreements, and the acquisition of development rights should be supported.

Discussion

Tourism and recreation rank third in importance in Washington's economy. Hunters and fishermen spend approximately $300 million annually in the State, not including license fees. In addition to its commercial value, wildlife fulfills a critical role in maintaining a proper ecological balance. Animals both distribute and fertilize plants; they consume each other and are consumed by man; some recycle waste.

Loss of habitat is the single most important threat to wildlife. The basic habitat requirements for the survival and propagation of all animal species are the proper combinations of food, water, cover and space. Elimination of any of these elements will result in death of the resident species.

While such animals as rats, mice, foxes, squirrels, chipmunks, skunks, raccoons, moles, shrews, bats and many birds can coexist with the suburban environment, human development generally threatens habitat. Habitat destruction results from the building of residential subdivision, shopping centres, new roads and highways, some logging practices, stream modifications, heavy recreation use and similar land use and human activities.

3. Cluster development should be encouraged so that the County can remain in its natural condition.

4. Where development occurs, clustered buildings with open space designed for wildlife should be encouraged.

5. All projects should be evaluated for their impact on fish, fowl and mammals.

6. Full compliance with environmental protection laws (NEPA,SEPA, Pollution Control, Migratory Bird Act, Shoreline Act) should be required prior to issuing permits.

7. The State should be encouraged to retain state tideland properties in public ownership.

In Thurston County, deer and grouse are widespread. A few elk, black bear, cougar, bobcat and coyote inhabit the hills. Beaver, muskrat, mink, otter, raccoon and nutria live in the undeveloped lowland water areas. Fox, possum, weasel, and skunk reside in valleys. Pheasant, grouse, quail, pigeons, doves, partridges and rabbit live in the rural areas.

Rare or endangered animals in Thurston County are: long-eared bat, ermine, cougar and black bear. Significant or endangered birds are: western goshawk, eagles, osprey, hawks, valley quail, snipe, dove, Hungarian partridge, ruffed and blue grouse, ring-necked and bobwhite quail, band-tailed pigeon, and waterfowl. Of these, waterfowl have been most threatened: the recent acquisition of the Nisqually Delta as a wildlife refuge is an important step towards conserving migratory birds.

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HOUSING & RESIDENTIAL DEVELOPMENT

GOAL: TO PROVIDE HOUSING THAT MEETS THE NEEDS OF ALL SOCIO-ECONOMIC GROUPS.

POLICIES:

1. Decent housing and a suitable housing environment shall be provided to all socio-economic levels.

2. Densities and lot sizes in keeping with land capability, availability of utilites and services, and with neighborhood goals should be established and observed.

3. Mobile homes should be allowed in planned mobile home subdivions, mobile home parks, and single lots in conformance with the standards governing placement of conventionally built homes. Modular or factory-built housing should be governed the same as conventionally built housing. Performance standards governing the site placement of mobile homes should be developed.

4. Rehabilitation of substandard housing should be encouraged.

5. Thurston County Housing Authority should coordinate housing programs with Olympia, Tumwater, Lacey, Yelm, Rainier, Tenino.

6. Development should, so much as possible, pay for itself.

7. Developers should be encouraged to maximize the variety of attractive neighborhood settings in terms of price range, amenities, natural settings, and proximity to other areas of activity.

8. Residential developments should be encouraged to maximize the variety of attractive neighborhood settings in terms of price range, amenities, natural settings, and proximity to other areas of activity.

9. Residential developments built within the urban core area or on the fringes of existing towns should include adequate provision for eventual connection to community sewer and water systems.

10. Residential neighborhoods should be protected from any land use incompatible with quality residential use.
    a. Neighborhood identity should be preserved by maintaining natural boundaries (road, creek, hill, tree stand).

11. Development should, as much as possible, pay for itself.

12. Performance standards for energy requirements in housing should be implemented.

13. Provision for pedestrian circulation should be made in new housing developments paying particular attention to the needs of children walking to and from the neighborhood school or bus stop.

Discussion

Unlike more urbanized states where dwelling units are becoming smaller (studios and economy units), housing in Washington and in Thurston County is becoming larger and more expensive. As a consequence, an increasing number of people must pay

more than 25% of their total income for housing. Of the more than 2,300 Thurston County households with incomes under $5,000 (1970), 68% of them are paying more than 35% of their monthly income for housing. Of the more than 2,400 renting households with incomes under $5,000, 91% of them are paying excessive housing costs. The greatest need for inexpensive rentals as of 1970 was in Yelm, Tenino, Johnson Point and East Lacey, and Rainier. More generally, 52% of the County's 61,820 households earning under $10,000 are paying excessive amounts for housing. There is, therefore, a need to insure that new housing is built in the income ranges where the need is identified.

While working towards increased production of new moderate income housing, the County also should be concerned with older substandard housing. Most of the substandard housing is in the southern part of the County, especially around Rainier, Bucoda, Grand Mount, Littlerock, and Maytown. Economic development in these areas will create a market for housing renewal.

With a deteriorating older housing stock and the economic difficulty in producing conventional moderate-income housing, mobile homes are increasingly popular. The different construction standards which enable mobile homes to meet the need for less expensive housing also mean that this form of housing has a shorter lifespan and is susceptible to destruction by fire. The plan calls for treatment of mobile homes as any other housing unit. However, separate standards for mobile homes covering factors specific to their design such as tie-down, skirting, smoke detection, foundations, may be necessary. Standards also are needed for mobile home parks or subdivisions to insure adequate separation between units and adequate access and circulation. Areas which in 1974 have significantly more mobile homes than other areas are:

Nisqually Valley, Martin Way, Mushroom Corner, Hawks Prarie, South Bay, East Black Lake, Scott Lake, and Carlyon Beach.

Consideration also should be given to the national goal of self-sufficiency in energy. Housing insulation and design should insure efficient use of energy, particularly heat-retention. Better insulation also will protect residents from noise pollution. When such standards conflict with the need for low-income housing an exception may have to be made. Housing should be located in relationship to employment opportunities so that people can walk to work or mass transit can be developed.

Even if each individual dwelling unit conforms to standards for safety and attractiveness, a poorly-planned collection of residential units can create problems. More flexible development standards may be needed to enable developers to provide residences within diverse settings at different price ranges.

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CHAPTER IV

OPTIMAL LAND USE

A. INTRODUCTION

The Optimal Land Use Element interprets the policies established in the Policy Plan and applies them to all County lands through generalized land use classification categories. These use categories are employed to separate both type and intensity of land use and are based on eight principles:

1. Land Capability:

The first consideration is the capability of the land to support a given intensity of use. Soil stability, soil permeability, flood proneness, and water table characteristics are among the factors used to define land capability. A detailed land capability map visually demonstrating the relationship between geologic, soil, hydrologic, forest, agriculture, and wildlife habitat factors has been developed to aid in determining appropriate land use. It is not now reproducible, but is available for reference at the Thurston Regional Planning Council office.

2. Resource Preservation:

Preservation is the second key aspect used to define optimal land use. Preservation of produc-

tive agricultural and forest land, wildlife and fish habitat areas, etc. are among the priorities defined in the Policy Plan. Keeping resouce options open for future needs is also part of this consideration. Preservation of access to major mineral deposits such as gravel and coal beds are priorities used in defining land use designations.

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3. Public Service Costs:

A third factor considered in developing the land use categories is ease of servicing development. Higher intensity of use necessitate consolidated service delivery systems. Individual wells and septic tanks must give way to community water and sewer systems. Thus the degree of intensity of use must be balanced against the cost feasibility of delivering services.

4. Enhance Tax Base:

A fourth consideration utilized to define use categories is the need to provide adequate County tax revenue. The industrial Park and Commercial use categories should achieve this.

5. Preserving the County's Rural Character:

A fifth factor of policy application is the maintenance and preservation of the rural atmosphere of the County. The design of the use categories is intended to achieve this end.

6. Existing Land Use:

A sixth factor is consideration of existing land use. The sections of the County abutting the urbanized northeastern portion of the County, for example, more logically will develop at higher densities than areas adjacent to state or commercial forest lands.

7. Citizen Preference:

The seventh consideration in designing and applying land use classification categories is citizen preference (all land use categories and their application to County lands based on information gathered through citizen meetings and questionnaires completed throughout the County).

8. Easy-to-Identify Boundaries:

The final consideration was the need for easily identified boundaries. Where possible, the boundaries follow existing roads, utility corridors, or observable terrain changes. When areas with severe limitations for development (soils, geology, flooding) do not coincide with such identifiable landmarks, the boundaries have been drawn with land capability in mind.

LAND USE MAP

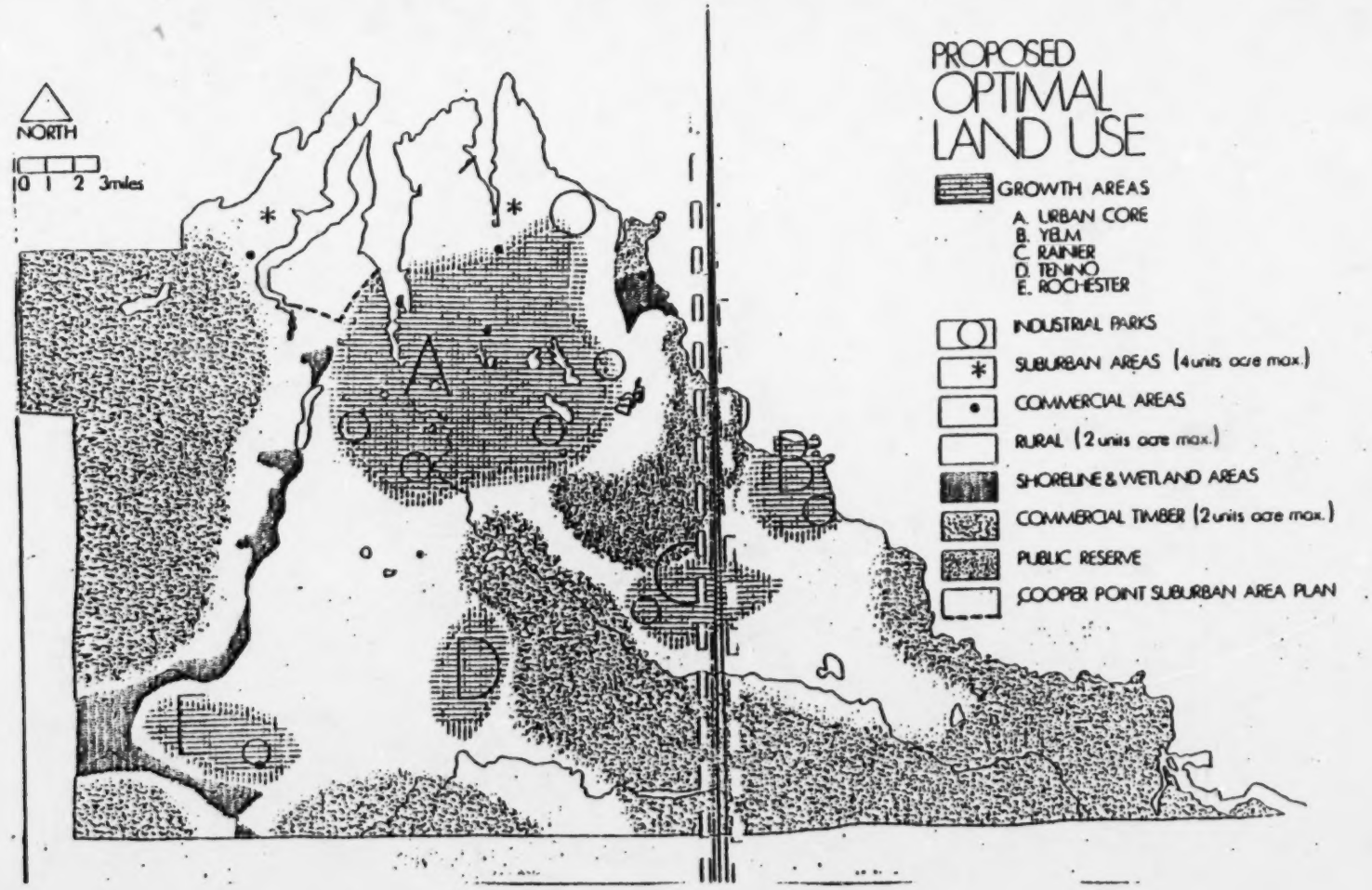
The optimal land use map is a general concept. It is not a zoning map, although eventually it will be used as a basis for land use controls once further detailed studies are completed. It does not answer the questions of the individual landowner, but addresses the concerns of the County as a whole. It provides the graphic application of the use categories to all unincorporated lands of the County. The sub-area plans will further refine this map as a prelude to preparation of a zoning map.

B. EXPLANATION OF OPTIMAL LAND USE MAP

The following text explains the optimal land use map, beginning with a description of the areas suited for high-intensity development and ending with a description of the areas generally unsuitable for growth and development. The overall

result of the optimal land use concept is that growth would be clustered in suitable areas (growth centers) which are surrounded by relative open space and separated from one another by functional greenbelts. The entire County itself is protected on all borders by greenbelts of various functions.

Until the many land capability maps used as a basis for these recommendations can be duplicated and made available to the public, individuals interested in further explanation of the optimal land use concept should contact Thurston Regional Planning Council staff for more detailed information.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PROPOSED
OPTIMAL
LAND USE
GROWTH AREAS
A. URBAN CORE
B. YELM
C. RAINIER
D. TENINO
E. ROCHESTER
INDUSTRIAL PARKS
SUBURBAN AREAS (4units acre max.)
COMMERCIAL AREAS
RURAL (2units acre max.)
SHORELINE & WETLAND AREAS
COMMERCIAL TIMBER (2units acre max.)
PUBLIC RESERVE
COOPER POINT SUBURBAN AREA PLAN

6. RURAL AREAS

PURPOSE:

To maintain the rural character of Thurston County. To preserve renewable and non-renewable natural resource areas of agriculture, forestry, aquaculture, mineral deposits, wildlife habitats, and other open space areas of the County from encroachment by, or irreversible conversion to, higher density non-natural resouce oriented uses.

DEFINITION:

Rural areas are those areas characterized by low density commercial and non-commercial natural resource based uses such as croplands, pastures, forests, mineral extraction, outdoor recreation and other open space activities. These uses are interspersed with low density single family residential dwellings. The maximum density for rural areas will be two units per acre. However, it is the intent of this Plan that generally the density for rural areas will be much lower than the maximum. Based on specialized factors such as land capability identified in the selection criteria below, densities for sub-areas of the Rural Area will be determined in sub-area plans. Higher density residential cluster developments will be possible on a limited basis, subject to strict standards to be established for Residential Planned Unit Developments* in the regulatory ordinance.

* Planned Unit Development for the purposes of this plan is intended to permit flexibility in design, placement of buildings and use of open spaces, including

Specialized use areas also will be defined within the Rural Areas at the time of zoning. These will designate certain activities as uses to be protected or enhanced and will include commercial agriculture, forest production, and mineral extraction. Permitted uses and densities established in the zoning ordinance and map for these sub-areas will be based on clearly identified standards. (Because the Rural Areas are large and include extremely diverse natural and functional characteristics, specific densities for sub-areas within this use category will be established at the time the County is zoned. These densities will be determined on the basis of Sub-Area Plans and performance standards for uses appropriate to Rural Areas.)

[footnote continued]

modification in requirements for lot frontage, building setbacks and design of circulation facilities to best use potentials of sites characterized by special features of geography, topography, size or shape, and to encourage a more creative approach in the development of land that will result in a more efficient, aesthetic, and desirable environment in harmony with that of the surrounding area.

SELECTION CRITERIA:

1. Land Capability: Land generally unsuited for moderate or high density development because of limited water supplies, soil characteristics, or topography.
2. Impact on Natural Resouces: Area has moderate to high potential for commercial resouce management in agriculture, forestry, aquaculture, mineral extraction or wildlife habitat.
3. Public Service Cost: Provision of public services for moderate to high density development will not be cost feasible.
4. Impact on Economy, Employment, and Tax Base: Basic, natural resource oriented industries which provide employment and a healthy tax base for public services will be enhanced.
5. Impact on County's Rural Character: Preference shall be given to those areas currently contributing to the rural character of the County.
6. Existing Land Use: Current land use primarily oriented towards resource management and open space activities.
7. Citizen Preference: Citizens prefer the maintenance of a low density natural resource based use area.

7. COMMERCIAL TIMBER AREAS

PURPOSE:

To preserve areas intended to serve a triple purpose: sustained-yield timber production, preservation of wildlife habitat, and provision of public recreational opportunities.

DEFINITION:

The commercial timber category includes large forest industry ownerships such as Washington State, Weyerhaeuser, Scott, Simpson, Boise-Cascade and Port Blakely ownerships. These commercial timber areas are committed to forest management as the highest and best use of these lands. Maximum densities will be two units per acre. It is the intent of this plan that generally the densities will be far lower than the maximum. The major determining factor in setting densities will be that no negative impact on commercial timber shall occur.

SELECTION CRITERIA:

1. Land Capability: Land generally unsuited for moderate or high density development because of limited water supplies, soil characteristics, or topography.
2. Impact on Natural Resources: Area has high potential for sustained yield forest production.
3. Public Service Cost: Requires few public services.

4. Impact on Economy, Employment, and Tax Base: Potentially provides employment and income for the County through tourism generated by outdoor recreational opportunites. Provides employment, and property tax revenue from commercial forestry.
5. Impact on County's Rural Character: Enhances the County's rural character acting as function greenbelt open space areas.
6. Existing Land Use: Curently under large ownership and commercially managed on a sustained yield basis.
7. Citizen Preference: Citizens support protecting commercial forest areas.

8. SHORELINE AND WETLAND AREAS

PURPOSE:

To preserve to the fullest possible extent the scenic and ecological qualities of the shorelines of Thurston County in harmony with those uses which are deemed essential to the life and well-being of its citizens.

DEFINITION:

All areas covered by the Shoreline Master Program of Thurston County are included in this area.

9. PUBLIC RESERVE AREAS

PURPOSE:

To provide protection of and coordination with land use areas whose management is the primary responsibility of other governmental units. County parks and private lands such as country club lands also could be zoned Public Reserve to protect them for their intended uses and to allow public review of plans for these areas.

DEFINITION:

The Evergreen State College site, the Fort Lewis training grounds, the Nisqually Indian Reservation and the Nisqually Delta Preserve

as well as State ownerships (Scatter Creek Preserve, Millersylvania and Tolmie Parks) are areas which should be protected by coordinating adjacent County land-use decisions with the purpose of the public reserve area, and vice versa.

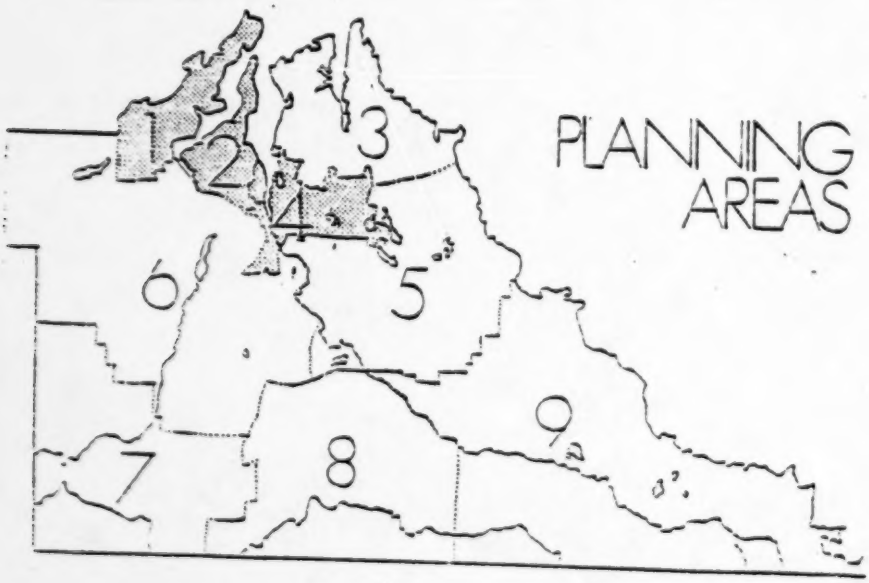
C. SUB-AREA PLANS

Purpose:

To maximize the involvement of citizens in the process of making land use decisions in Thurston County. The sub-area plans are intended to involve residents and property owners in refining the provisions of the more general Comprehensive Plan and apply detailed policies to specific areas of the County.

Definition:

Sub-area plans are detailed plans that give specific direction as to type, intensity, and location of land uses. In addition, these plans will address concerns such as circulation and transportation, forestland, agriculture land open space preservation, housing and public services.



Method:

The County is divided into the following nine areas for which sub-area plans will be developed: (1) Summit Lake, (2) Cooper Point, (3) Boston Harbor-Johnson Point, (4) Olympia-Lacey-Tumwater, (5) Lacey Environs-East Olympia, (6) Black Lake-Littlerock, (7) Rochester, (8) Tenino, (9) Yelm-Rainier.

The County Planning Commission and its staff will work with existing or yet to be organized neighborhood planning groups from each of the selected areas in the process of developing each sub-area plan. These plans will be reviewed by the Thurston County Planning Commission and referred to the Thurston Cuonty Board of Commissioners for final review and adoption as part of the Comprehensive Plan for Thurston County.

Cooper Point Plan:

The Comprehensive Land Use Plan for Cooper Point is considered a completed sub-area plan and is included by this reference as a part of this Comprehensive Plan for Thurston County.

1. GRIFFIN
2. COOPER POINT
3. NORTHEAST THURSTON
4. OLYMPIA-LACEY-TUMWATER
5. LACEY ENVIRONS-EAST OLYMPIA
6. BLACK LAKE-LITTLE ROCK-DELPHI
7. ROCHESTER
8. TENINO
9. YELM-RAINIER

plans completed

CHAPTER VII

HOUSING

A Regional Housing Assistance Plan will be developed so that the region can qualify for desired federal funds. The Plan should include a housing inventory; a needs estimate for low and moderate income housing; annual goals for assisted housing; and a regional implementation program to be administered by county-wide housing authority.

Additional studies should recommend performance standards for mobile homes, mobile home parks, and mobile home subdivisions and any additional housing-related regulations such as a property maintenance code in an effort to reduce inequities, and increase the production of moderate income housing. Incentives which might result in more production of low and moderate income housing and in clustering and innovative design of housing should be recommended.

CHAPTER VIII

NATURAL RESOURCES

A. Agriculture

An agricultural planning study is necessary to identify ways to preserve agricultural land, enhance production of timber and general commercial farming lands, and to encourage subsistence farming through land use controls and economic interests.

B. Mineral Study

The economics of mineral extraction in the zones proposed for such activity should be examined. The depth of mineral deposits, the amount of processing needed before the gravel or coal is salable, and the need for more stringent controls on extraction and rehabilitation than is provided by current State guidelines should be analyzed. Recommendations for desired uses after rehabilitation (sanitary landfill, lagoons, or residential/industrial use) will be developed.

C. Shorelines and Wetlands Study

This study will evaluate further the shorelines and wetlands proposed for the Mud Bay, Grass Lake and Woodard Bay Drainage sub-basins as well as the Black, Chehalis, Deschutes, and Nisqually River floodplains.

CHAPTER X

GOVERNMENT

The studies necessary to implement the policies in the Government will be included in this element.

This element will embody the studies necessary to implement the policies for Government listed in the Policy Section of this Plan. These studies will be undertaken in Phase II of the Comprehensive Plan program. The focus and desired outcome of these studies will be determined by the Thurston County Board of Commissioners.

CHAPTER XI

REGULATORY PROCESS

The final detailed study in the Comprehensive Plan will be the major interim step between the other Phase II studies and the preparation of an implementing ordinance for the County. With the results generated by comprehensive planning efforts and by the previously outlined studies, the Planning agency should analyze and make recommendations regarding:

1. A review of all existing ordinances, where not covered by other task forces or studies.

2. Procedures to ensure a fair, effective, and efficient regulatory process. This would include: an analysis of administrative options available to produce a regulatory system that would incorporate the concepts of a one-stop permit system and include environmental quality standards, Shoreline Management requirements, Subdivision regulations, Environmental Impact Statement guidelines, other performance standards and zoning and land use requirements.

3. Mechanisms to insure continued citizen participation in decision making.

4. A procedure for evaluation of conformance of decision making to the Comprehensive Plan.

The goal will be to produce a simple, streamlined regulatory process which promotes flexibility and minimizes "red tape". The zoning ordinance should reflect as much as possible variations in land capablility and community goals and should be designed to incorporate new information as it is generated. A general zoning ordinance should be adopted as soon as possible to provide protection to the South County: as sub-area plans are completed, the additional guidelines provided should be added to the zoning ordinance.

. . . .

CHAPTER XIII

IMPLEMENTATION

Once this Plan is adopted by County government, it should be used by school districts, conservation districts, highway departments, utilities companies, and any other formally constituted board whose activities involve or are affected by community planning. The implementation section of the Plan should list all implementing actions taken by County government or other agencies. This section is the living, changing record of the actions taken to implement the intent of the Comprehensive Plan. As such, only one or two master copies can be kept updated. These copies should be available for public inspection at the County Courthouse.

By looking at this section, one should be able to determine what policies and recommendations have been implemented and which have not. All pertinent ordinances should be noted here. All resolutions by legislative bodies which have bearing on the Policy Sectin and Action Section should be recorded here. All capital improvement programming should be briefly noted here and kept up to date; so that one can determine where roads are being built, where sites are being required, what research is being done, and what programs are being administered.

NO. 45816

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES and LAKE LAWRENCE, INC.,
Respondents,
vs.
THURSTON COUNTY, GEORGE BARNER, JR., DEL PETIT and MARJ YUNG
constituting the Board of Thurston County Commissioners and as individuals,
Appellants,
vs.
LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, ROY HARRISON, DAVID COOPER, ROBERT PATRICK and WILLIAM FOSDICK,
Intervenors.

STATEMENT OF ADDITIONAL AUTHORITIES ON MOTION FOR RECONSIDERATION OF LAKE LAWRENCE, INC., RAP 10.8

---

153 1st Street
P.O. Box 443
Poulsbo, Washington 98370
Telephone: (206) 779-5518

PHILIP P. MALONE
Attorney for Lake Lawrence, Inc.

STATEMENT OF ADDITIONAL AUTHORITIES is hereby made in behalf of Lake Lawrence, Inc., that the following cases pursuant to RAP 10.8 apply to that portion of Lake Lawrence, Inc.'s Motion For Reconsideration hereinafter set forth. The motion assigned error that the County Commissioners in April and May, 1978, in reviewing the Shorelines Hearings Board decision and denying approval of the plat and issuance of a substantial development permit, while adversary parties to mandamus proceedings and when not having appealed the Shorelines Hearings Board decision entered new findings, conclusions and a decision on environmental grounds were acting without authority and jurisdiction contrary to the Administrative Procedure Act, RCW 34.04.130 (1). Error was also assigned that the Court findings, conclusions and decision of the Commissioners when their de novo review was limited by RCW 34.04.130 (1). The authorities relevant to such errors with reference made to the Motion For Reconsideration are:

1. Re: Motion For Reconsideration: "II. SUMMARY OF ERRORS FOR RECONSIDERATION; 2.1 Review without due process of law, RCW: 34.04.130", pages 3-4 and "III. JUDICIAL REVIEW WITHOUT DUE PROCESS OF LAW; 3.1 De Novo Review of a mandamus action and Board's decision", pages 7-14:

   (a) State ex rel Welch v. Seattle School District No. 1, et al, 45 Wn.2d 6, 272 P.2d 617 (1954) at pages 8 and 9.
   (Issue: Commissioners acting without authority or jurisdiction in mandamus action when not appealing)

   (b) Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976) at pages 286 and 287.
   (Issue: RCW 34.04 applies to Hearing's Board decision)

   (c) Department of Highway v. Environmental Council, 82 Wn.2d 280, 510 P.2d 216 (1973) at pages 283-287.

(Issue: Supreme Court authority of review in absence of appeal by the Commissioners of Shorelines Hearings Board decision to the Superior Court was governed by RCW 34.04.130 (1) and the Court was without appellate jurisdiction to adopt findings, conclusions and decision of Commissioners as determinative of the issues in the case)

2. Re: Motion For Reconsideration: "II. SUMMARY OF ERRORS FOR RECONSIDERATION; 2.2 Commissioners exercise of authority without due process of law, "clearly erroneous", RCW 34.04.130 (6)(e)", pages 4-7 and "III. JUDICIAL REVIEW WITHOUT DUE PROCESS OF LAW; 3.2 Judicial Review, RCW 34.04.130, (6)(e), "clearly erroneous", pages 14-20:

(a) Swift v. Island County, 87 Wn.2d 348, 552 P.2d 175 (1976) at pages 355, 357 and 362.

(Issue: "piecemealing" of a single project platting subject to SEPA and SMA)

DATED this 26th day of November, 1979.

Respectfully submitted,

s/
Philip P. Malone
Attorney for Petitioner,
Lake Lawrence, Inc.

Copies to all counsel of record

A-425

SUPREME COURT OF THE UNITED STATES

No. A-986

LAKE LAWRENCE, INC., ET AL,

Appellants

v.

THURSTON COUNTY, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including May 28, 1980.

s/
Associate Justice of the
Supreme Court of the
United States

Dated this 16 day
of May, 1980

Supreme Court, U. S.
FILED
JUL 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

vs.

THURSTON COUNTY, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF APPELLEES TO DISMISS OR AFFIRM

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney

ALEXANDER W. MACKIE
Special Deputy Prosecuting Attorney
Owens, Weaver, Davies & Dominick
926 - 24th Way, SW
Olympia, WA 98502

Counsel for Appellees

No. 79-1880

IN THE

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October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

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ALEXANDER W. MACKIE
Special Deputy Prosecuting Attorney
Owens, Weaver, Davies & Dominick
926 - 24th Way, SW
Olympia, WA 98502

Counsel for Appellees

No. 79-1800

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

The Appellees move the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that the issues raised are questions not properly addressed to this Court or are so insubstantial as not to need further arguments.

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THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

This case arises from the appeal by Lake Lawrence, Inc. from the decision of the Washington Supreme Court in Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 604 P.2d 494 (1979). The decision is also the subject of a writ of certiorari sub nom. Department of Natural Resources v. Thurston County, U. S. Supreme Court No. 79-1844.

The case below is a tale of two permits: a preliminary plat permit which is administered by the Board of Thurston County Commissioners pursuant to Chapter 58.17 Wash. Rev. Code, and a shoreline substantial development permit which is initially administered by the Board of County Commissioners, but is ultimately controlled by the state Shorelines Hearings Board under Chapter 90.58 Wash. Rev. Code.

The case below also raised the question as to the responsibility of differing agencies to consider the environmental consequences of a project under the State Environmental Policy Act (SEPA), Chapter 43.21C Wash. Rev. Code, and the legal consequences when two agencies reach different conclusions as to the environmental consequences of a project.

The project in question was a proposal to subdivide 14 acres of land leased by the applicant, Lake Lawrence, Inc., hereinafter referred to as the "Applicant," from the State of Washington, Department of Natural Resources, hereinafter referred to as the "Department."

The County Commissioners required an Environmental Impact Statement and thereafter held public hearings on the proposal in August and September, 1977. Wash. Rev. Code § 58.17.100. Plat review is based on the public interest to be served by the development, and approval is discretionary with the Commissioners. Wash. Rev. Code § 58.17.110 On September 28, 1977, the County Commissioners determined that the site was actively used by bald eagles as a feeding and perching area and that portions of the project contemplated by the Applicant materially disrupted that use. The County Commissioners determined the project to be inconsistent with the comprehensive plan and contrary to the public interest, and decided to deny the preliminary plat and the necessary shoreline substantial development permit.

The Applicant and the Department filed two appeals: (1) The plat denial was appealed to the local superior court for a writ of review to determine whether the decision was arbitrary, capricious, corrupt or unlawful. The procedure followed is spelled out in Wash. Rev. Code § 58.17.180 and Chapter 7.16 Wash. Rev. Code, governing special proceedings. The record was delivered to the court and the matter was set for trial on April 16, 1978. (2) The shoreline substantial development permit denial was appealed by the Applicant and the Department to the state Shorelines Hearings Board for a de novo hearing on whether the project was consistent with the state Shoreline Management Act. The procedure followed is spelled out in Wash. Rev. Code § 90.58.180, et seq.

The shoreline permit case was tried in February, 1978 and decided March 23, 1978. The Shorelines Hearings Board determined that

the project was consistent with the state Shoreline Management Act and that the proposal adequately mitigated the adverse environmental impacts identified during the proceedings.

The Shorelines Hearings Board remanded the case back to the County Commissioners for further proceedings consistent with the decision. The decision specifically noted the provisions of the state Shoreline Management Act, Wash. Rev. Code § 90.58.360, which require that all other permits must be obtained before the proposal can proceed. App. at A-59.

Upon receiving the decision of the Shorelines Hearings Board, the County Commissioners petitioned the Superior Court to have the record remanded for reconsideration of the plat denial in view of the decision of the state Shorelines Hearings Board.

The court granted the requested remand on April 10, 1978. Counsel for Lake Lawrence was not at the April 10, 1978 hearing, but did petition the following week for reconsideration. On April 17, 1978, the request for reconsideration was denied and at the applicant's request, the trial court did direct that all subsequent appeals, if any, be consolidated and heard on July 6 and 7, 1978.

Counsel for Lake Lawrence did not appeal the denial of reconsideration or the order remanding the proceedings for reconsideration.

On April 10, 1978, the Commissioners visited the site as a preliminary to holding the rehearing on the preliminary plat. The visit was a special meeting of the Board duly called in open session in accordance with state law.

On April 18, 1978, the County Commissioners held a public hearing in accordance with the remand order and in accordance with the public notice as required by state law. Counsel for both the Department and the Applicant were present and participated fully in argument and presentation of additional factual evidence.

Counsel for the Applicant submitted the entire record of the Shorelines Hearings Board proceedings into the record before the County Commissioners and presented substantial comment and argument on the case.

Counsel for both the Department and the Applicant were specifically advised of the site visit and were asked if they objected to one or more of the Commissioners participating in the final decision. Both counsel said they had no objection to all three Commissioners hearing and deciding the case.

The County Commissioners again denied the preliminary plat on rehearing on April 24, 1978.

The Department and the Applicant immediately filed for a writ of mandamus to direct the issuance of both the substantial development permit and the preliminary plat. The allegations in the complaint were duly denied by the County and trial was held May 22, 1978. Counsel for the Department and Lake Lawrence called no witnesses, and, in spite of the denial by the County of all material allegations, submitted the case on the pleadings. The trial court denied the requested writ.

The Department and Applicant filed a writ of review to have the court consider the validity of the plat denial.

The Applicant also moved for reconsideration of the denial of the writ of mandamus which was consolidated with argument on the merits of the plat denial.

A stipulation was entered into for purpose of argument on the issues of lawfulness under Wash. Rev. Code § 58.17.180. The Department and the Applicant conceeded that the findings by the County were supported by evidence in the record and were not "arbitrary or capricious."

The stipulation further provided in pertinent part:

> The parties hereto do stipulate as follows:
>
> 1. The parties agree there is one issue of law for the Court to consider; that is whether Respondents, on April 24, 1978 and thereafter, had constitutional and legislative authority to do the following:
>
> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle habitat) having already been presented to the Shoreline Hearings Board;
>
> (b) Make a decision on the record before the Shoreline Hearings Board

> and the evidence at new public hearings contrary to and in conflict with the prior Shoreline Hearings Board judgment on the same matter;
>
> (c) Enter Findings of Fact, Conclusions of Law, and Judgment contrary to and in conflict with the Shoreline Hearings Board judgment of March 23, 1978.

. . . .

> 3. If the answer to the issue posed in item one (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), then the matter of damages of the Petitioner will be scheduled for a separate hearing before the Court, without prejudice to any defense, legal or equitable, which may be raised by Respondents herein.

Respondents' Stipulation and Order on Issues Under Review at pp. 1-2 (Thurston County Superior Court Cause No. 58623), (See Lake Lawrence Inc. v. Thurston County et al., U. S. Supreme Court No. 79-1800 App. to Jurisdictional Statement at p. A-107.)

Argument on the lawfulness of the plat denial and reconsideration of the denial of the writ of mandamus was held July 28, 1978.

The trial court entered its decision on August 11, 1978, and on September 25, 1978, issued findings of fact and conclusions of law and judgment directing issuance of the substantial development permit and preliminary plat.

Thurston County timely appealed and obtained a stay of the judgment directing issuance of the permits and of the trial on the issue of damages.

The Washington Supreme Court heard argument, issued its decision, denied motions for reconsideration, and ultimately issued its mandate February 23, 1980. The petition for writ of certiorari was filed on May 23, 1980, and the jurisdictional statement was filed for the appeal on May 28, 1980. The Clerk has granted Respondents until June 30, 1980, to respond to both actions.

ARGUMENT

The appeal is unsubstantial for several reasons. The statutes alleged to be unconstitutional by the Applicant are substantially similar to statutes which have been recently upheld by this Court. The statutory conflicts raised by the Applicant are conflicts between the workings of different state laws which are not properly subject to appeal before this Court. Finally, the Applicant raises issues of fact which were resolved against the Applicant in the lower courts, and which were not properly preserved on appeal by the Applicant.

1. The Appeal Should be Dismissed for Failure to Raise a Substantial Federal Issue.

Applicant seeks the jurisdiction of this Court under 28 U.S.C. § 1257(2) (1976). The only jurisdictional basis for appeal in this case is the holding implied in the court below that Washington's State Environmental Policy Act, Chapter 43.21C Wash. Rev. Code, Platting and Subdivision Act, Chapter 58.17 Wash. Rev. Code, and Shoreline Management Act, Chapter 90.58 Wash. Rev. Code, do not operate to unlawfully deprive the Applicant of property without due process of law or just compensation under the Fifth and Fourteenth Amendments of the United States Constitution.

The claim is patently specious. This Court has frequently upheld the authority of state and local governments to adopt land use regulations for the protection of the community. Such regulations may well prohibit an applicant from pursuing a favored or desired land use as they did in the present case. Such a bar standing along does not lead to an invalidation of such laws even when based on environmental or aesthetic concerns. Agins v. City of Tiburon, 40 CCH S. Ct. Bull. p. B2864 (No. 79-602, June 10, 1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Counsel has pointed to no feature of any of the statutes which would raise a substantial federal issue and the appeal is therefore groundless.

2. The Decision Below Should be Affirmed.

The balance of issues raised by Applicant are issues more properly considered by this Court under 28 U.S.C. § 1257(3) (1976), but even these issues do not give rise to an issue which warrants the noting of jurisdiction or an approval of certiorari.

The Applicant first seeks to have this Court reinstate the holdings of the trial judge which were based on the trial court's belief that the decision of the Shorelines Hearings Board precluded an independent environmental review by the Board of Thurston County Commissioners.

The court below ruled that under Washington law, the County Commissioners had the obligation to conduct an independent environmental review in connection with the platting process. As stated by the court below:

> It follows from our conclusion that the Commissioners are not bound by the finding of the Shorelines Hearings Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal, and had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagle.

Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 667, 601 P.2d 494 (1979).

The authority of a Washington State Board of County Commissioners vis-a-vis the

Washington state Shorelines Hearings Board in reviewing a plat, is a matter of State interest raising no significant federal question. This Court has consistently refused to consider issues which involve only state issues. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); Wilson v. Loew's, Inc., 355 U.S. 597, 598 (1958).

The Applicant next seeks to have this Court act as a trial court to resolve factual issues pertaining to the conduct or misconduct of the County Commissioners in holding hearings and making its decision to deny the preliminary plat. This Court has long held that it will not grant certiorari to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925); see also, Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1962).

At trial, counsel argued misconduct of the County Commissioners as one of the grounds for ruling in Applicant's favor. While ruling for the Applicant on the legal issues involving the Shorelines Hearings Board, the trial court refused to enter any of the requested findings pertaining to misconduct by the County Commissioners in handling the case. The Washington State Supreme Court likewise took note of the Applicant's claim and found that Applicant's procedural rights had not been violated.

As stated in Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in

> the absence of a very obvious and exceptional show of error."

Id. at 275.

Furthermore, the Applicant took no exception to the failure of the trial court to enter the requested findings of misconduct. Thus, even if the conduct raised a federal question worthy of consideration by this Court, the Applicant failed to properly present and preserve the issue on appeal. This Court has long held that preservation of federal issues is not discretionary, but jurisdictional to the Court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Applicant's claim that it is entitled to a new trial on the taking issue is also frivolous. Appellant's submission of the case below on the administrative record and stipulation and failure to present evidence on the factual issues pertaining to the taking issue at the several opportunities below, certainly precludes the Applicant from now seeking such relief from this Court.

Furthermore, the court below fully considered the taking claim and ruled that given the availability of development to different configurations or density within the same property, no taking occurred under state and federal laws. This issue is discussed in great detail in Respondents' Brief in Opposition, filed in connection with the companion case. Department of Natural Resources v. Thurston County U. S. Supreme Court No. 79-1844, Respondents' Brief at pp. 9-12.

CONCLUSION

The Applicant's central contention appears to be that in making findings of fact contrary

to the findings of fact made by the Shorelines Hearings Board, the County Commissioners somehow violated the Applicant's fundamental rights, and in denying the requested plat configuration, took the Applicant's property without just compensation.

Given the fact that the County Commissioners held different hearings from the Shorelines Hearings Board and made its decision on the basis of its own record, not just the record before the Shorelines Hearings Board, the difference in findings and conclusions is certainly explainable. When the difference in legislative mandates is also considered, (compare Wash. Rev. Code § 58.17.100-110 with Wash. Rev. Code § 90.58.180) the fact that two agencies came to different conclusions on different records can hardly be said to be surprising, let alone a violation of fundamental federal rights.

The taking claim raised is factually and legally without merit.

The appeal is totally without merit and should be dismissed.

DATED this 30th day of June, 1980.

Respectfully submitted,

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney

ALEXANDER W. MACKIE
Special Deputy Prosecuting Attorney
Owens, Weaver, Davies & Dominick
926 - 24th Way, SW
Olympia, WA 98502

Counsel for Respondents

No. 79-1880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Certificate of Service

Alexander W. Mackie, duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States, hereby certifies in compliance with Rule 33(b) that he has caused to be served on all parties required to be served herein on June 30, 1980, three copies of the Brief of Respondent in Opposition by placing the same in an envelope, addressed as below set forth, and by depositing the same in the Post Office of the City of Olympia,

Thurston County, Washington, postage prepaid thereon, to-wit:

The Honorable Slade Gorton, Attorney General
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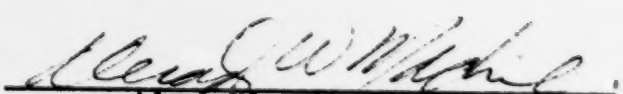

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NO. 79-1880

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

LAKE LAWRENCE, INC.,
Appellant,

v.

THURSTON COUNTY, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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THERE ARE SUBSTANTIAL FEDERAL QUESTIONS FOR THIS COURT TO DECIDE AND THE COURT HAS JURISDICTION AS A MATTER OF RIGHT AND DISCRETION UNDER 28 U.S.C. § 1257(2) and (3)

Substantial federal questions of importance were presented, expressly passed upon, or necessarily decided by the judgment of the court below. They remain the same and are now presented in the Jurisdictional Statement. The appellees' motion is actively misleading to camouflage their importance by implying that the property rights and freedom of the appellant were merely regulated by the operation of valid, constitutional statutory regulations[1], of SEPA, the platting statute, and SMA[2], in that the actions of appellees merely constituted an adjudication of facts in carrying out that linked "validity"

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[1] Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, ___ U.S. ___, 65 L. Ed. 2d 106, 100 S. Ct. ___ (1980).

[2] SEPA: State Environmental Policy Act, Chapter 43.21C, J.S., App., A-266; Platting Statute, Chapter 58.17, J.S. App., 58.17; SMA: Shorelines Management Act, Chapter 90.58, J.S. App. A-280.

and therefore the questions presented are disputes of fact not of importance for this Court to decide (Motion 8-13).

In summary, a decision to one group of those questions, Qs. 1-2, is dependent upon a decision to the other group, Qs. 3-8. The first summarized question that arises is whether the Fifth and Fourteenth Amendments guarantee the exercise of the fundamental rights of a person established by common law and statutes having validity by equally, area-wide, applying written, informative standards limiting those rights that have been held to statutorily vest and cannot be retrospectively changed, even by legislation, after an application has been made in compliance with their regulations[3], i.e. SMA and its Master Program

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[3]Ogden v. City of Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899 (1954); Hull v. Hunt, 53 Wn.2d 125, 127-131, 331 P.2d 856 (1958); Bishop v. Town of Houghton, 69 Wn.2d 786,

regulations, and leave it up to the freedom, liberty and discretion of a person to make a choice as to both how to choose to use and use, enjoy, dispose of and make a profit from private property for residential purposes, so long as the choice and use is made and limited within the bounds of written, informative standards, specifications and guidelines set forth in regulatory statutes having validity because of the information of the standards they contained and their area-wide application to property, without having singled out one piece of property only, which have been held to establish rights of a person as to how to choose to use and use private

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footnote cont.

795, 420 P.2d 368 (1966); State ex rel. Kuphal v. Bremerton, 59 Wn.2d 825, 828, 371 P.2d 37 (1962); Sharinghouse v. Bellingham, 4 Wn. App. 198, 203, 480 P.2d 233 (1971); Parkridge v. Seattle, 89 Wn.2d 454, 460-461, 462-467, 573 P.2d 359 (1978). Compare: United States v. Lee, 106 U.S. 196 (1882).

property that are in compliance with their written, informative standards[4].

The appellant challenged that the appellees exercised such powers of government to deprive and take away such liberty of choice and property rights of appellant in excess and beyond the scope of SEPA and the platting statutes' expressed or implied delegated authority; that the excessive exercise of such state police power by administrative adjudication deprived the appellant of its freedom, liberty and rights as to how to choose to use and use its private property, and that such actions resulted in its private property rights being taken for public use without just compensation as protected by the due process and equal protection clauses and prohibited by the Fifth and Fourteenth Amendment and Article I, Section 16 of the

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[4]Supra, footnotes 1 and 3.

Washington Constitution. Or, in the alternative, if the statutes, as applied, delegated to the appellees such authority such statutes were invalid for the same reason[5]. The judgment ruled against the challenges made as to the first alternative and the second alternative (J.S. 2-8).

The second question that arises is if the person has those rights, can the person's rights to just and fair judicial procedural and substantive due process and equal treatment of the law in obtaining judicial remedies against the local government and its public officials, who exercised those state police powers under color of state law, claimed to be in violation of its Fifth and Fourteenth Amendment rights, inter alia, be likewise checkmated, circumvented and thwarted by that same local government and its public officials for a

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[5] Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-289 (1921).

second time claiming while adversary parties to actions commenced against them for the same violations that they have police powers unbounded by any statutory procedural or substantive standards or guidelines to authorize them to procedurally proceed out of court and by fiat make substantive findings and conclusions of law out of court and file them in court as judicial proof of their authority and substantively dispositive of the judicial constitutional claims against them, as the judgment has authorized the appellees to do so and continue to do in the future on any application by the appellant to be made to use its private property[6]?

This second summarized federal question appears in Questions 1 and 2 of the

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[6] See J.S. Judgment, App. A-199; United States v. Lee, 106 U.S. 196 (1882); Sterling v. Constantin, 287 U.S. 378, 396-398 (1932); Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979).

Jurisdictional Statement and was passed upon and necessarily decided when the court held:

> "[T]he Commissioners are not bound by the findings of the Shorelines Hearings Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal and, had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagle." (Emphasis added; J.S. Judg., App., A-197.)

The order accepting appellate jurisdiction and staying the pending trial likewise passed upon the procedural and substantive authority of the appellees to do so, and the court below to have jurisdiction, when the appellees chose not to appeal the Board's decision to the trial court and yet circumvented the SEPA procedural and substantive safeguards;[7] the mandates of SMA and the Master Program

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[7] SEPA, procedure: 43.21C.030(2)(a)-(e); substantive: 43.21C.060, J.S. App., A-266-269.

regulations[8] and "contested" the Board's SMA and SEPA findings out of court and presented their findings and conclusions in trial court and the court below as proof of their authority in face of the prohibition of the Administrative Procedure Act[9].

THE JUDGMENT BELOW WAS NOT BASED ON AN ADEQUATE NON-FEDERAL BASIS AS A MATTER OF FACT AND LAW

The jurisdiction of the Court in this case is not based upon the invalidity of language appearing on the face of

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[8]SMA, "A permit shall be granted . . .", 90.58.140, (2)(b), J.S. App., A-288-289; Shorelines Hearing Board, 90.58.170-180, J.J. App. A2950-198; changing of Master Program regulations, 90.58.190, J.S. App., A-299; lands adjacent to shoreline lands, 90.58.340, J.S. App., A-300.

[9]See J.S., Administrative Procedure Act, RCW 34.04.130 Contested cases-Judicial Review, (1), (3); Appellant's Motion and Memo for Discretionary Review, J.S., App. A-153, 173; Supreme Court Order Accepting Certification, J.S., App. A-183; Appellant's Motion For Reconsideration, J.S. App. A-202; Supreme Court Order Denying Motions for Reconsideration, J.S. App. A-245.

statutes, but the absence of language and the interpretation and application of language of statutes, the validity of which was upheld by the judgment[10]. The Jurisdictional Statement need not to have pointed in questions raised to statutory language on its face that was not invalid[11]. Nor does the statement call upon the Court to resolve disputes of facts; except to examine the record that the appellees' actions were not the exercise of administrative adjudication in the application of valid, area-wide, land-use regulations that the motion claims, and there is no evidence in the record to support facts found by the court below to

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[10] Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921); First Nat. Bank v. Anderson, 269 U.S. 341, 345-347 (1926); Motion, para. 4, pg. 9.

[11] Ibid, Fiske v. Kansas, 274 U.S. 380, 385 (1926); Staub v. City of Baxley, 355 U.S. 313, 319-320 (1957); Motion, para. 4, pg. 9

support its conclusions of law as to state and federal questions interdependent upon those facts found by the court.[12] "Springes" may not be set, "for those who are endeavoring to assert rights that the State confers", and the assertion of federal rights are not to be defeated by procedural or substantive "springes" of state law, when "plainly and reasonably made"[13]. The motion sets "springes" when camouflaging the appellees' actions to be the authorized application of "valid" statutory regulations authorized by the trial court return of the record; the Shorelines Hearings Board decision; and the stipulation, when there is no evidence in

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[12] Fiske v. Kansas, 274 U.S. 380, 385-386 (1926); Creswill v. Grand Lodge Knights of Pythias of Georgia, 225 U.S. 246, 261 (1911); Motion, para. 2, pg.11.

[13] Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); Hill, The Inadequate State Ground, 65 CLR 943 (1965).

the record to support those conclusions[14].

The only source of statutory procedural and substantive authority used by the appellees when making their first and second decision on environmental grounds only to not approve the appellant's first choice of a plat subdivision of 27 residential lots, authorized by the standards of the Master Program regulations, and succeeding submissions of the appellant to demands made by the County reducing the number of lots to 24 and finally to 22 lots; not issue a shorelines permit for such subdivision, and not permit a private community pier to be constructed for private family residential use of the land and the use of the riparian rights[15], was the use of isolated language of the

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[14]Motion, pp. 3-8, 11-12.

[15]J.S., 20-24; Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979).

platting statute and SEPA[16], not implemented by any valid area-wide statutory regulations, such as the Master Program standards for subdivision and use of the land upon which the appellant relied.

The appellees and the judgment justified the jurisdiction and authority of the appellees and the jurisdiction of the court below[17] on inadequate state grounds to authorize the appellees while adversary parties making a second environmental

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[16] RCW 58.17.110, J.S., App. A-277: "The . . . county legislative body shall inquire into the public use and interest proposed to be served. . . .", by the platting. J.S., Judg., App. A-193-194; 196-198. RCW 43.21C.030, J.S., App. A-266: "The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this act. . . ." J.S., Judg., App. A-197-198.

[17] State ex rel. Welch v. Seattle Schl. Dist. No. 1, 45 Wn.2d 6, 272 P.2d 617 (1954); Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976) at 286 and 287; Dept. of Highways v. Environmental Council, 82 Wn.2d 280, 510 P.2d 216 (1973) at 282-287.

decison out of court when not appealing to the trial court the Shorelines Hearings Board decision and to act as advocates, judge and jury of their own authority, when circumventing the expressed procedural and substantive safeguards of statutory laws.[18]

The judgment after first concluding that the Comprehensive Plan "governs here", against the objection that its application would amount to discriminatory "spot zoning": J.S., Judg.,.App. A-189, based on the isolated, broad, extensive language of SEPA and the platting statute held that the Commissioners have:

> "[I]ndependent authority under SEPA . . . and that the denial of the plat in this case does not violate respondents' rights to due process or constitute a taking of private property for public use without compensation." (J.S., Judg., App. A-192-193; empha. added)

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[18] Supra footnotes, 7-9.

The conclusion of the independency of the procedural, substantive, adjudicatory authority of the Commissioners to make a second decision was based upon inadequate state grounds when narrowing the substantive, adjudicatory authority of the Board under SMA and SEPA to the shorelines area only of the site[19] and holding the Commissioners had greater independent, procedural and substantive authority than the Board when applying the broad, vague, uncertain, ambiguous and isolated language of the platting statute.[20]

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[19] Merkel v. Port of Brownsville, 8 Wn. App. 844, 850-51, 509 P.2d 390 1973; Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 556, 572 P.2d 1121 (1974); Sisley v. San Juan County, 89 Wn.2d 78, 83, 569 P.2d 712 (1977). Cf., results of judgment with cases cited in footnote 3, as to inconsistency. The Master Program definition of "residential development" (J.S., App. A-362) includes the non-physical "legal division of real estate"; supra footnote, 7, 8 and 9.

[20] Compare: The trial court's conclusions: 3.4 Public Interest and 3.5 Legislative

Then in answer to the challenge that the isolated language of the platting statute was over-broad, ambiguous, vague, and misleading and would be a violation of the due process and equal protection of law guarantees of the Fourteenth Amendment when applied to implement through administrative adjudication its language and not valid statutory regulations, the judgment inconsistently shifted, dodged, evaded, and without any adequate or tenable state authority arbitrarily concluded that the Commissioners' authority to deny the plat "derives essentially from SEPA" and that since SEPA is not a:

Footnote Continued
Intent re Platting. The trial court's decision on 'vagueness' is in accord with this Court's decision limiting the scope of the term 'public interest' in National Association for the Advancement of Colored People v. Federal Power Commission, 425 U.S. 647, 669-670 (1976). Note also the platting statute used the term "public use" that the judgment applied. Cf., Berman v. Parker, 348 U.S. 26 (1954).

> "[R]egulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standards, the vagueness doctrine as such is not applicable. See Blondheim v. State, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975)." (J.S. Judg., App. A-197.)

The reasoning is completely contrary to a similar evasion of the same challenge made to a non-regulatory vague Florida statute that this Court held invalid[21]. In this case such application is more of an unfair trap caused by the conflicts from "voice of the state" that arise when the appellant relied on SMA; the valid Master Program regulations; the procedural and substantive safeguards of SEPA; the Administrative Procedure Act, and the prior decisions of the court below with which the judgment is inconsistent[22].

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[21] Cramp v. Bd. of Public Instruction, 368 U.S. 278, 280, 287-288 (1961).

[22] Raley v. Ohio, 360 U.S. 423, 438-439 (1958); supra, footnote 3, 7, 8 and 9.

The non-SEPA environmental criteria that the appellees used and the judgment justified for the Commissioners to determine that a "cluster configuration" was favored as a non-SEPA "alternative"[23], over the choice of the appellant's subdivisions and that the status of eagles was "endangered", so as to determine to deny the plat and issuance of a shorelines permit on environmental grounds of their own making, was by borrowing that language from the Comprehensive Plan, a plan that on its face states its purposes as being a "blueprint" for legislation only and not adjudication in that it had not been implemented by any valid area-wide regulations and therefore created no statutory rights, benefits or detriments; except upon

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[23]Trial Court's findings, 2.7 Alternative Conditions, J.S. App. A-121; A-116: "the court believes that the actions of the respondents will destroy the property for all practical human uses" (Memorandum Opinion).

the appellant by political adjudication only in this case.[24] The judgment upheld the validity of the plan's application as not being an act of "spot zoning" in the face of the "Rural Environment" statutory zoning designation of the property (Judg., J.S. App. A-189), and also held that the actions of the Commissioners' use of the plan's language would not result in inverse condemnation in that subject to the will of the Commissioners there is a "possibility" that they may approve a plat with a "cluster configuration" with less lots to protect the status of the eagles as "endangered" under the plan (J.S., Judg., App. A-199). The finding of such "possibility"

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[24] Second Decision, J.S. App. A-76-79; Plan, J.S. App. Forward, A-381; Wildlife, A-396; State ex rel Krupehral v. Bremerton, 59 Wn.2d 825, 371 P.2d 37 (1962); Sharinghouse v. Bellingham, 4 Wn. App. 198, 480 P.2d 233 (1971).

has no evidence in the record[25] to support it and support the judgment's conclusion, based on that vague "possibility", that the appellant had a "balance test":

> "[P]resent, possible, and reasonably profitable alternative use to which" its property is "adaptable".[26]

The appellant's opportunity to a hearing on that fact was cut off by the appeal and judgment. The "possibility" is more remote when the second decision was based upon the appellees' lack of environmental knowledge of the impact to eagles by human use of the property, a SEPA duty that the appellees didn't fulfill[27].

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[25]First Decision, J.S. App. A-30; Second Decision, J.S. App. A-69; Appellant's Pet. and Affidavit for Review and Prohibition, J.S. App. A-32; Motion for Prohibition-S. Ct., J.S. App. A-232.

[26]Supra, footnote 21, J.S. Judg., App. A-199-120

[27]Supra footnote 7, 43.21C.030(2)(a)-(e); 43.21C.060, A-266-269; Second Decision, J.S. App. 77-79, supra, footnote 23.

CONCLUSION

The broad, vague language of SEPA and the platting statutes applied by the appellees had not been implemented by informative, valid, environmental, statutory regulations equally applicable to the benefit and detriment of the private use of property on the lake, as the valid Master Program regulations did upon which the appellant relied. The appellees used vague language only as authority to act under the guise of administrative adjudication to create the procedural and substantive means they employed to implement by adjudication de facto, special, legislation, and change the property rights of the appellant. The judgment and jurisdiction of the court below is without an adequate, non-federal basis and is in conflict with opinions of the court on federal questions (see Appendix).

Respectfully submitted
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Counsel for Appellant

APPENDIX

FEDERAL QUESTIONS IN CONFLICT WITH OPINIONS OF THE COURT

1. May common law and statutory rights to use private property, held to have vested[1] after an application is made to local government for permission to use private property, be made misleadingly to a person of common intelligence,[2] and be retrospectively[3] changed and "taken" away by the application by government of broad, misleading, statutory language[4] for a public use or purpose[5] "without the constitutional way of paying for the change"[6] to effect under the guise of

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[1] Footnote 3 of text.

[2] Raley v. Ohio, 360 U.S. 423 (1958).

[3] United States v. Lee, 106 U.S. 196 (1882).

[4] Cramp v. Bd. of Public Instruction, 368 U.S. 278, 287-288 (1961); National Assoc. For Adv. of Colored People v. Federal Power Com., 425 U.S. 647 (1976).

[5] Berman v. Parker, 348 U.S. 26 (1954).

[6] Penna. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

administrative adjudication a change of those rights to implement a plan, a "blueprint" for future legislation,[7] without valid legislation,[8] a separate power of government?[9]

2. May public officials by such application of statutory powers, unfairly, unequally,[10] on an ad hoc, piecemeal, discriminatory basis, arbitrarily[11] pick, choose, and select as they may determine only the appellant's liberty and rights to be burdened as a condition to their conferring governmental permission to use private

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[7] Footnote 22 of text.

[8] Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383, 390 (1979; Penn Central Transp. Co. v. City of New York, 439 U.S. 883 (1978); Agins v. Tiburon, ___ U.S. ___ 65 L. Ed. 2d 106 (1980).

[9] Mugler v. Kansas, 123 U.S. 623, 662 (1887).

[10] Ibid, 8.

[11] Supra, footnote 3; People v. Tibbits, 305 N.E. 2d 152, 155 (1973).

property by withholding that permission enforceable by criminal sanctions if used without it?[12]

3. Can public officials demand by force of criminal sanction that the use of private property be set aside within a selected piece to preserve areas of the natural environment as they may choose free from all human activity, otherwise authorized by valid area-wide standards of environmental statutory regulations for the protection of that same environment, the Shorelines Master Program comprehensive regulations, upon which the person misleadingly relied[13] and when that burden is imposed on no other use of private property in the area, the county, or in the state where it is located, so as not to have an

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[12] Platting Statute, 58.17.300, Violations-Penalties, J.S. App. A-280.

[13] J.S. 14-42.

"average reciprocity of advantage"[14] to the appellant when changing those rights expressed by valid regulations, promulgated by administrative adjudication only when the appellees usurped that function so legislatively expressed of the will of the people?[15]

4. Is a hearing and substantive decision out of court by a party's adversaries determinative of those questions as having such naked powers justifying the appellees' actions in making a second decision and determinative by the judgment reversing the trial court's mandamus order

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[14] Supra, footnote 6, 260 U.S. 383, 415; footnote 8.

[15] Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675; Mr. Justice Powell dissenting, 680; Mr. Justice Stevens with Mr. Justice Brennan, 680-689, citing Fasano v. Board of County Comm'rs, 264 Ore. 574, 580-581, 507 P.2d 23, 26 (1973) and Fleming v. City of Tacoma, 81 Wn.2d 292, 298-199, 502 P.2d 327, 331 (1972).

and pending trial for constitutional damages and compensation equivalent to a fair and impartial trial in court in final determination of those questions?[16]

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[16] Sterling v. Constantin, 287 U.S. 378 (1932); United States v. Lee, 106 U.S. 196 (1882).